No. 180

In the Supreme Court of the United States

OCTOBER TERM, 1958

WILLIAM L. GREENE, PETITIONER,

v.

NEIL M. MCELROY, THOMAS S. GATES, JR., AND ROBERT B. ANDERSON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS

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OPINIONS BELOW

The opinion of the district court (R. 476–79) is reported at 150 F. Supp. 958. The opinion of the court of appeals (R. 480–96) is reported at 254 F. 2d 944.

JURISDICTION

The judgment of the court of appeals was entered on April 17, 1958 (R. 496–97). The petition for a writ of certiorari was filed on July 16, 1958, and was granted on October 27, 1958 (R. 497). 358 U.S. 872.

[1] The action has abated as to Mr. Anderson, who ceased serving as Secretary of the Navy on April 30, 1954, and as Deputy Secretary of Defense on August 4, 1955 (R. 12).

The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Petitioner, as an executive employee of a government contractor engaged in classified defense research, was denied access to classified defense information after a determination by appropriate government officials that the granting of such access would not be clearly consistent with the interests of national security. This determination was made on the basis of evidence offered by petitioner and confidential information contained in government files, a summary of which was furnished to petitioner to the extent permitted by security considerations. The questions presented are:

1. Whether the Department of Defense regulations, establishing the procedures pursuant to which petitioner was denied access to classified information, were authorized by statute or otherwise.

2. Whether petitioner's interest in access to classified information was "liberty" or "property" of which he could not be deprived without due process of law.

3. Whether the procedures by which petitioner was denied access to classified information satisfied the requirements of due process of law.

STATUTES AND REGULATIONS INVOLVED

The pertinent portions of the statutes and regulations involved are set out in the Appendix, *infra*, pp. 1a–31a.

STATEMENT

Petitioner was formerly the General Manager and Vice President in charge of engineering of the Engi-

neering and Research Corporation (ERCO), a corporation engaged in classified research under contracts with the Department of the Navy (R. 27). Each of the contracts incorporated by reference the Department of Defense Industrial Security Manual for Safeguarding Classified matter.[2] In addition, in a basic security agreement entered into on June 5, 1951 (R. 17–21), ERCO undertook "to provide and maintain a system of security controls within its or his own organization in accordance with the requirements of the Department of Defense Industrial Security Manual attached hereto and made a part of this agreement * * *." (R. 18.) The Manual in turn provided:

> [¶4. e.] The Contractor shall exclude (this does not imply the dismissal or separation of any employee) from any part of its plants, factories, or sites at which work for any military department is being performed, any person or persons whom the Secretary of the military department concerned or his duly authorized representative, in the interest of security, may designate in writing.
>
> * * * * *
>
> [¶6.] No individual shall be permitted to have access to classified matter unless cleared by the Government or the Contractor, as the case may be, as specified in the following subparagraphs and then he will be given access to

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[2] Pertinent portions of the Manual, dated January 18, 1951, are reprinted in the Appendix to this brief, *infra*, pp. 28a–31a. The entire Manual is contained in the original record at pp. 44–62.

such matter only to the extent of his clearance. * * *

In accordance with this provision, the Secretary of the Navy, on April 17, 1953, advised ERCO as follows (R. 2–3, 29):

> I have reviewed the case history file on William Lewis Greene and have concluded that his continued access to Navy classified security information is inconsistent with the best interests of National security.
>
> In accordance with paragraph 4. e. of the Industrial Security Manual for Safeguarding Classified Security Information, therefore, you are requested to exclude William Lewis Greene from any part of your plants, factories or sites at which classified Navy projects are being carried out and to bar him access to all Navy classified security information.
>
> In addition, I am referring this case to the Secretary of Defense recommending that the Industrial Employment Review Board's decision of 29 January 1952 be overruled.

ERCO promptly complied with this request (R. 176) and at some time thereafter terminated petitioner's employment (R. 3, 176).

This suit was instituted by petitioner on August 20, 1954 (R. 1), seeking a judgment (a) declaring the acts of the respondents "in advising plaintiff's employer that plaintiff could not be employed, illegal, null, void and of no effect;" (b) restraining the respondents from "doing any act in pursuance of the said illegal declaration that plaintiff is not entitled to be employed by" ERCO; and (c) requiring respondents to advise ERCO that the letter of April 17, 1953, is null and

void (R. 8–9). The district court, on April 8, 1957, granted the respondents' motion for summary judgment and for dismissal of the complaint (R. 476–79). This judgment was affirmed by the court of appeals on April 17, 1958 (R. 480–97).

1. *Factual background.* With the exception of a short period of time not here material, petitioner had been employed by ERCO since 1937 (R. 2). In connection with this work, he had been given clearance to classified information by the Army on August 9, 1949; by the Assistant Chief of Staff G–2, Military District of Washington, on November 9, 1949; and by the Air Materiel Command on February 3, 1950 (R. 28). However, on November 20, 1951, the Army-Navy-Air Force Personnel Security Board[3] advised ERCO by letter that, on the basis of information then available to it, the Board had tentatively decided to deny ERCO access to classified Department of Defense contracts, and to revoke ERCO's previously granted security clearance, for the reason that the Board had taken tentative action to deny petitioner access to all classified information (R. 31–32). In order to remove this impediment to ERCO's future work on classified contracts, petitioner left the company on extended furlough pending final determination of his case, and the Board was so advised (R. 32–34).

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[3] This was the screening board responsible under the then existing industrial security program for making initial security determinations. The procedures governing this board are set out in the Appendix, *infra*, pp. 2a–20a.

On December 11, 1951, ERCO and petitioner were notified that petitioner's existing clearances for access to classified Department of Defense information and materials were revoked and that consent was denied for petitioner's continued access to classified contract work (R. 34–36). Petitioner was also advised of his right to appeal this decision to the Industrial Employment Review Board (IERB), including the right to a hearing before that board with or without counsel and witnesses of his selection.

At petitioner's request, the IERB scheduled a hearing on the matter and furnished him with a statement of the grounds upon which the screening board had determined to deny him access to classified information (R. 37–38).[4] This hearing was conducted on January 23, 1952 (R. 39–171), following which the IERB reversed the decision of the screening board and granted petitioner access to classified information up to and including "secret" (R. 172–73).

On March 27, 1953, the Secretary of Defense, by memorandum to the three service Secretaries, abol-

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[4] This statement was as follows (R. 37):

"That over a period of years, 1943–1947, at or near Washington, D.C., you have closely and sympathetically associated with persons who are reported to be or to have been members of the Communist Party; that during the period 1944–1947 you entertained and were visited at your home by military representatives of the Russian Embassy, Washington, D.C.; that, further, you attended social functions during the period 1944–1947 at the Russian Embassy, Washington, D.C.; and on 7 April 1947 attended the Southern Conference for Human Welfare, Third Annual Dinner, Statler Hotel, Washington, D.C. (Cited as Communist Front organization, Congressional Committee on Un-American Activities.)"

ished the Army-Navy-Air Force Personnel Security Board and the Industrial Employment Review Board (R. 173–75). At the same time, he directed the service Secretaries to establish joint regional Industrial Personnel Security Boards and uniform standards, criteria, and procedures to govern the disposition of industrial security cases by such boards (R. 174–75). The memorandum provided further that cases pending before the previous boards would be transferred to the new boards when established.

Pending implementation of this memorandum, the Secretary of Defense directed that "[t]he Criteria Governing Actions by the Industrial Employment Review Board * * * shall govern security clearances of industrial facilities and industrial personnel by the Secretaries of the Army, Navy and Air Force until such time as uniform criteria are established in connection with paragraph 6 of this memorandum" (R. 174). As noted *supra*, p. 4, acting under this authority, and in accordance with paragraph 4. e. of the Industrial Security Manual, the Secretary of the Navy, on April 17, 1953, advised ERCO that he had reviewed petitioner's case history file, that he had concluded that petitioner's continued access to Navy classified security information was inconsistent with the best interests of national security, that petitioner should be barred access to such information, and that he was recommending to the Secretary of Defense that the decision of the IERB of January 29, 1952, granting petitioner a security clearance, be overruled (R. 2–3). By letter of April 24, 1953 (R. 176–77), ERCO advised the Secretary that in accordance with

his request it had excluded petitioner from any part of its plant, factories, or sites and had barred him access to all classified security information. ERCO further stated that petitioner had tendered his resignation as an officer of the corporation and had left the plant, and that it would have no further contact with him until his security status was clarified. Subsequently, petitioner's employment with ERCO was terminated (R. 472).

Effective May 4, 1953, regional Industrial Personnel Security Boards, and new standards and criteria for determining industrial security cases, were established by the service Secretaries pursuant to the memorandum of the Secretary of Defense of March 27, 1953.[5] Following a request by petitioner's attorney for further consideration of petitioner's case, the newly-established Eastern Industrial Personnel Security Board, at the request of the Assistant Secretary of the Navy for Air (R. 21–22), took jurisdiction to redetermine petitioner's case. On or about March 20, 1954, petitioner's attorney requested the Board to furnish petitioner with a detailed statement of reasons covering certain specific matters (R. 178–80). On April 9, 1954, the Board furnished petitioner a statement, to the extent permitted by security considerations, of the information which had resulted in the termination of his access to classified information, all of which had been discussed with petitioner at his prior hearing before the Industrial Employment

[5] This regulation in its entirety is contained in the original record at pp. 9–31 and is reprinted in pertinent part in the Appendix, *infra*, pp. 20a–26a.

Review Board (R. 9–11). The information was as follows:

1. During 1942 SUBJECT was a member of the Washington Book Shop Association, an organization that has been officially cited by the Attorney General of the United States as Communist and subversive.

2. SUBJECT's first wife, Jean Hinton Greene, to whom he was married from approximately December 1942 to approximately December 1947, was an ardent Communist during the greater part of the period of the marriage.

3. During the period of SUBJECT's first marriage he and his wife had many Communist publications in their home, including the "Daily Worker"; "Soviet Russia Today"; "In Fact"; and Karl Marx's "Das Kapital".

4. Many apparently reliable witnesses have testified that during the period of SUBJECT's first marriage his personal political sympathies were in general accord with those of his wife, in that he was sympathetic towards Russia; followed the Communist Party "line"; presented "fellow-traveller" arguments; was apparently influenced by "Jean's wild theories"; etc.

5. In about 1946 SUBJECT invested approximately $1,000 in the Metropolitan Broadcasting Corporation and later became a director of its Radio Station WQQW. It has been reliably reported that many of the stockholders of the Corporation were Communists or pro-Communists and that the news coverage and radio programs of Station WQQW frequently paralleled the Communist Party "line".

6. On 7 April 1947 SUBJECT and his wife Jean attended the third Annual Dinner of the Southern Conference for Human Welfare, an organization that has been officially cited as a Communist front.

7. Beginning about 1942 and continuing for several years thereafter SUBJECT maintained sympathetic associations with various officials of the Soviet Embassy, including Major Constantine I. Ovchinnikov, Col. Pavel F. Berezin, Major Pavel N. Asseev, Col. Ilia M. Saraev, and Col. Anatoly Y. Golkovsky.

8. During 1946 and 1947 SUBJECT had frequent sympathetic associations with Dr. Vaso Syrzentic of the Yugoslav Embassy. Dr. Syrzentic has been identified as an agent of the International Communist Party.

9. During 1943 SUBJECT was in contact with Col. Alexander Hess of the Czechoslovak Embassy, who has been identified as an agent of the Red Army Intelligence.

10. During 1946 and 1947 SUBJECT maintained close and sympathetic association with Mr. and Mrs. Nathan Gregory Silvermaster and William Ludwig Ullman. Silvermaster and Ullman have been identified as members of a Soviet Espionage Apparatus active in Washington, D.C., during the 1940's.

11. SUBJECT had a series of contacts with Laughlin Currie during the period 1945–48. Currie has also been identified as a member of the Silvermaster espionage group.

12. During the period between 1942 and 1947 SUBJECT maintained frequent and close associations with many Communist Party members, including Richard Sasuly and his wife Eliza-

beth, Bruce Waybur and his wife Miriam, Martin Popper, Madeline L. Donner, Russell Nixon and Isadore Salkind.

13. During substantially the same period SUBJECT maintained close association with many persons who have been identified as strong supporters of the Communist conspiracy, including Samuel J. Rodman, Shura Lewis, Owen Lattimore, Ed Fruchtman and Virginia Gardner.

A hearing, at which petitioner and his attorney were present, was held before the Eastern Industrial Personnel Security Board on April 28, 29, and 30, 1954 (R. 182–461). The Board heard the testimony of petitioner and his witnesses and received further evidence presented by petitioner. The Government called no witnesses to testify.

On the basis of this hearing, together with confidential investigation reports of the Federal Bureau of Investigation and of other investigative agencies which were contained in the file of the case (R. 182), the Board, on May 10, 1954, concluded that "the granting of clearance to [petitioner] for access to classified information is not clearly consistent with the interests of national security," and both petitioner and ERCO were so advised (R. 461–63).

On June 4, 1954, petitioner's attorney requested the Board to provide him with a copy of the transcript of the hearing, as well as a statement of findings (R. 463–64). By letter of June 9, 1954 (R. 464–65), the Executive Secretary of the Board advised the attorney that "security considerations prohibit

the furnishing to an appellant of a detailed statement of the findings on appeal inasmuch as the entire file is considered and comments made by the Appeal Division panel on security matters which could not for security reasons form the basis of a statement of reasons." (R. 465). A transcript of the hearing was subsequently forwarded to petitioner's attorney (R. 30).

On August 20, 1954, petitioner's complaint in this action was filed in the district court (R. 1–9). (See pp. 4–5, *supra*.) Subsequently, on February 2, 1955, the Security Clearance Directive of May 4, 1953 (*supra*, pp. 6–8), was superseded by the Industrial Personnel Security Review Regulation issued by the Secretary of Defense.* This regulation established the Industrial Personnel Security Review Board, *inter alia*, and gave it jurisdiction to review adverse decisions of the prior regional boards at the request of the individual concerned, for good cause shown (App., *infra*, p. 28a). Petitioner duly appealed to that Board, filing a brief and supporting affidavits (R. 22–23). By letter of March 12, 1956 (R. 22–24), the Board notified petitioner that it had affirmed the decision of the Eastern Industrial Personnel Security Board on the ground that its findings were supported by the evidence and other material before it. The letter stated (R. 23–24):

> After a review of all the information in the case * * * the Review Board has entered its

* This regulation in its entirety is contained in the original record at pp. 538–62. Pertinent portions are reprinted in the Appendix, *infra*, pp. 26a–28a.

determination in this matter. This determination, which affirms the decision of the Eastern Industrial Personnel Security Board entered on May 10, 1954, is that, on all the evidence, Mr. Greene's access to classified information is not clearly consistent with the interests of national security.

In reaching this determination, the Review Board reviewed the findings of the Eastern Industrial Personnel Security Board in accordance with its mandate under the above regulation, and determined that there was substantial support for said findings in the evidence and other material before the Review Board.

The findings of the Appeal Division, Eastern Industrial Personnel Security Board included, among other things, the following:

1. That during the period from 1942 to 1947, knowing of their activity on behalf of the Communist Party and sympathizing with it, Mr. Greene associated closely with his ex-wife, Jean Hinton, Mr. and Mrs. Richard Sasuly, Mr. and Mrs. Bruce Waybur, Martin Popper, Russell Nixon, Isadore Salkin, Shura Lewis, and Samuel J. Rodman, all of whom were members of the Communist Party or active in its behalf.

2. That in 1946 and 1947, knowing of their sympathy for the Communist Party, Mr. Greene associated closely with Mr. and Mrs. Nathan Gregory Silvermaster, William Ludwig Ullman, and Lauchlin Currie, all of whom have engaged in espionage on behalf of the Soviet Union.

3. That for a number of years beginning in 1942, Mr. Greene maintained a sympathetic association with a number of officials of the

Soviet Embassy, as set out in the Statement of Reasons furnished to him.

4. That from 1942 to 1947 Mr. Greene's political views were similar to, and in basic accord with, those of his ex-wife, Jean Hinton.

5. That Mr. Greene was a member of the Washington Book Shop Association; invested money in and became a director of the Metropolitan Broadcasting Corporation; attended a function of the Southern Conference of Human Welfare; and had in his home a number of Communist publications as set out in the Statement of Reasons furnished to him.

6. That Mr. Greene's credibility as a witness in the proceedings before it was doubtful.

In reaching its determination in this case, the Review Board concluded, on the basis of the above findings, that Mr. Greene had been in close contact with a number of individuals who were either trusted officials of the Soviet Union or members of the Communist Party actively engaged in its work; that these associations were undertaken and continued with knowledge of the sympathies and activities of these individuals; and that he has been sympathetic towards the Communist Party and the Communist movement.

In addition, the Appeal Division, Eastern Industrial Personnel Security Board, had strong doubts as to Mr. Greene's credibility as a witness. These doubts were shared by the Review Board. This lack of credibility goes to the heart of the concept of trustworthiness, upon which all security clearances ultimately rest.

Longstanding policy has dictated that only those persons who are determined to be trustworthy shall have access to classified informa-

tion (For the latest expression see EO 10501). The Review Board found that such a determination could not be made in Mr. Greene's case, and, therefore, that the decision of the Appeal Division, Eastern Industrial Personnel Security Hearing Board, must stand.

2. *Proceedings below.* A stipulation of facts having been filed in the district court (R. 27), both parties moved for summary judgment (R. 470, 474–75). The court granted summary judgment for respondents and ordered the complaint dismissed (R. 479), holding (R. 476–79) that petitioner's discharge resulted solely from his employer's willing agreement to abide by security requirements; that in so contracting the Government was acting properly to protect itself against threats to its survival; and that petitioner accordingly had shown no invasion of his legal rights. The court stated further that, assuming *arguendo* that petitioner was entitled to a hearing and review, the record failed to show any violation of procedural due process.

The court of appeals unanimously affirmed (R. 480–97). It noted that petitioner did not contend that officials of the Department of Defense had failed to comply with any of the applicable regulations under which they had proceeded, or that they had improperly classified the contract work to which petitioner had been denied access (R. 485). It also noted that the relief which petitioner seeks would require a court order "to compel the Government to disclose its classified defense information to a person—himself—whom the Secretary of Defense considers unworthy of such access" (*ibid.*). The court held that the Department of Defense industrial security pro-

gram was fully authorized; and that the Secretary of Defense had the power to classify defense information, to designate the persons qualified for access to such information, and to make regulations establishing the methods and procedures for carrying out this function (R. 485–89). It also held that the security program was not unreasonable in its coverage or procedures and that the lack of "confrontation" and full disclosure of investigative reports did not, in the circumstances of this case, violate any of petitioner's constitutional rights (R. 489–96). The court stated that this was not a case where the Government had undertaken to regulate an area of private employment or private enterprise, but only a case where it had denied an individual access to its own military secrets, and that no court had ever required the Government to disclose such information contrary to its own wishes. In view of these considerations, the court held that no justiciable controversy was presented, despite the fact that serious practical consequences to petitioner may have resulted.[6a]

SUMMARY OF ARGUMENT

I

The power on which the industrial security regulations are based is the inherent power of the executive

[6a] The Defense Department advises that all clearances at all levels granted under the Industrial Security Program during the years 1949 through 1958 (November 21, 1958) totaled approximately 3,500,000. No figures are available for the number of denials or revocations of clearance during the years 1949 to July, 1953. From July 1953 to August 31, 1958, the total number of cases involving derogatory information of sufficient seriousness to require consideration of possible clearance denial or revocation was 3,459. During that period, the total number of denials and revocations was 1,006.

to have and protect military secrets in the course of executive operations. Having the power to protect secrets, the executive may provide procedures for determining to whom classified information may be disclosed, and may instruct recipients of such information not to disclose it to unauthorized persons. No statutory authorization is needed. If, however, a statutory source of the power to have and control secret information be deemed essential, the power can be inferred as a necessary implication from the legislation creating the defense establishment. In any event, there is no applicable statutory limitation on the power, and the only substantial question presented is whether any constitutional limitations forbid the exercise of the power which is here involved.

II

The basic constitutional question is whether the interest in being permitted access to classified information, and thus being able to work on classified government contracts, is "liberty" or "property" entitled to the procedural protections of the Fifth Amendment. That question depends not only upon the substantiality of the injury resulting from governmental action, but also upon the nature of the interest affected.

A. In controlling the dissemination of classified information, the Government acts in a proprietary capacity—*i.e.*, in the management and protection of property committed to its custody for governmental use. Private persons are allowed access to such information solely for the convenience of the Government and they acquire no interest that can be described as more than a permissive use. It is clearly not an

interest that has traditionally been accorded legal protection.

1. Such action by the Government in the control of its own property is very different in nature from the exercise of a legislative or regulatory power affecting the legal rights and duties of private persons at large. In the cases involving private employment, relied upon by petitioner, the governmental interference was of the latter type, imposing a legal disability upon the person affected (*e.g.*, by denial of a license to engage in an occupation, *Schware* v. *Board of Bar Examiners*, 353 U.S. 232; *Parker* v. *Lester*, 227 F. 2d 708 (C.A. 9)). Even assuming *arguendo* that the practical consequences to petitioner of the Government's withholding of its secrets from him might be the same as a legal bar to his employment in the aircraft industry, the distinction between the nature of the interests involved is deeply rooted in our law. See *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113.

2. Governmental action may, however, be subject to certain kinds of constitutional restraints even though the interest affected does not appear to be otherwise legally protected. Thus, although there is no "right" to government employment, this Court has observed that "Congress may not 'enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office.'" *United Public Workers* v. *Mitchell*, 330 U.S. 75, 100. See also *Wieman* v. *Updegraff*, 344 U.S. 183, and *Slochower* v. *Board of Education*, 350 U.S. 551, holding that dismissals from state employment on the basis of an arbitrary statutory standard violated "substantive" due process. The underlying basis of these cases,

we submit, is that there is an affirmative right granted by the Constitution itself for one to be free of certain kinds of discrimination by the state, regardless of the nature of the interest affected—a concept, although part of "substantive" due process, closely akin to that of the equal protection clause. The same is not true, however, of "procedural" due process; procedure is not an end in itself and some substantive interest must first be recognized before procedural due process can be claimed. Thus there remains the problem of defining the kinds of interests qualifying as "life, liberty, or property," and of determining whether petitioner's interest falls in that class.

B. Recognition of petitioner's interest in obtaining access to classified information as "property" or "liberty" entitled to constitutional protections would inevitably require a departure from the traditional reluctance of the courts, because of considerations implicit in the constitutional separation of powers, to interfere with the internal affairs of the Government. See *Decatur* v. *Paulding*, 14 Pet. 497, 516. One such area of noninterference has been in the award of contracts. Another is the removal of government employees, the history of which was summarized in *Bailey* v. *Richardson*, 182 F. 2d 46, 57 (C.A.D.C.), affirmed by an equally-divided Court, 341 U.S. 918: "Never in our history has a Government administrative employee been entitled to a hearing of the quasi-judicial type upon his dismissal from Government service."

The reasons for not restricting the executive's power to control military secrets are even more persuasive, for here we are dealing with the most vital

interests of the nation. Judicial supervision in this field will involve the courts in passing judgment on the executive's appraisal of the requirements of the national security, a function which they are ill-equipped to perform. In this case, for example, petitioner seeks the production of confidential informants, while the executive department has concluded that the disclosure of such informants would jeopardize its intelligence systems, as, for example, by the loss of essential informants who will not supply information other than under assurances of strict confidence. Whatever the merits of the dispute over the necessity for such measures, we submit that it is not the kind of issue the courts are competent to resolve.

The extent of the potential conflict of executive and judicial powers is emphasized by the relief sought in this case. Petitioner seeks, in effect, an order requiring that he be given access to classified information. Any such order would no doubt permit the Government to provide another hearing meeting the procedural requirements imposed, but if the requirements include confrontation, the alternative would equally require revealing information the secrecy of which the executive deems to be required by the national security. Such a decree would amount to mandamus of the executive to disclose one of the two kinds of secret information (*i.e.*, classified contract data or confidential informants), and thus conflict directly with a most important prerogative of the executive branch.

There is thus an important distinction between this case and cases where the Government is not forced to reveal secret information but has the option, instead, of suffering some other consequence, such as foregoing

prosecution. Cf. *Jencks* v. *United States*, 353 U.S. 657. There is also a significant distinction between this case and the discharge of government employees, for in the latter case it may be possible to remove the employee from access to classified information without dismissing him. Here, the Government has no such choice. Recognizing a constitutional right of confrontation would, in substance, subject the Government to compulsory process to disclose one kind or the other of state secrets. The Government would have no other alternative because it cannot compel the employer to retain petitioner in some non-sensitive post.

Recognition of the interest asserted here may also impinge upon the executive's traditional powers in the award of contracts. If, having given a suspected employee a clearance rather than disclose the confidential information against him, the Government remains free to refuse to award further classified contracts to the contractor, the employee's alleged "right" may not be of substance—although both the Government and the contractor may be injured. If, on the other hand, the Government is under a duty not to deny further contracts for that reason, its freedom in contracting has been impaired.

C. If petitioner's interest in obtaining access to classified information is not itself a right entitled to constitutional protection, it is not made so by the alleged consequential injury to reputation. The governmental action taken was the minimum necessary to withdraw the Government's secrets from petitioner and no characterization was attributed to petitioner beyond that inherent in the action itself. If the Government's withholding of information from petitioner

was otherwise lawful and privileged as an exercise of its right to control its own property, it is not made unlawful by the consequential damage to reputation. *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, and *Harmon* v. *Brucker*, 355 U.S. 579, involving essentially gratuitous labelling or publication independent of any other substantive action, are not in point.

In any event, petitioner's right to the relief he seeks—restoration to access to classified information—must be predicated upon a right to that access as such. If the only protected interest is the interest in reputation, that relief would be inappropriate.

III

A. Even if the procedural requirements of the due process clause are applicable, petitioner's rights were not violated by the use of information the sources and details of which were not disclosed to him. The record reveals that petitioner had adequate opportunity to know the general grounds upon which his security clearance was revoked and to attempt to explain or refute the facts underlying those grounds. He did not deny the essential facts but only attempted to explain their significance and to suggest the inferences which should properly be drawn from them. Nondisclosure did not unduly hamper petitioner's presentation of his case.

B. Such withholding of sources and details of information was justified by considerations of national security and adequate protection of investigative sources and techniques. This public interest is so essential

that petitioner's interest in full disclosure must be accommodated to it. In other situations where the national interest has been an overwhelming one, this Court has sustained the use of confidential information even though constitutional or statutory rights were at stake. *Carlson* v. *Landon*, 342 U.S. 524; *United States* v. *Nugent*, 346 U.S. 1. The case of *Parker* v. *Lester*, 227 F. 2d 708 (C.A. 9), relied on by petitioner, is distinguishable, and is not persuasive to the contrary.

ARGUMENT

I. THE REGULATIONS ESTABLISHING THE INDUSTRIAL SECURITY PROGRAM ARE BASED ON THE EXECUTIVE POWER OF THE PRESIDENT AND DO NOT VIOLATE ANY STATUTORY RESTRICTIONS

1. With petitioner's contention that the Industrial Security Program is not explicitly authorized by statute we may readily agree, for no such authorization is necessary. The power of the executive department to control, in the internal operations of the executive branch, the dissemination of secret military information in its custody is peculiarly and primarily an *executive* power. It does not depend upon a congressional grant of power, but flows from the constitutional vesting of the "executive Power" in the President and the President's powers as "Commander in Chief of the Army and Navy." While Congress might constitutionally limit the power or impose restrictions on how it might be exercised—just as Congress may, within limits, confine the President's otherwise inherent removal power—the source of the executive power lies in the Constitution, not

in congressional enactments. If doubt there could be, it is resolved by 170 years of history. There have been military secrets since the beginning of the republic, and a "secret" can exist only by virtue of the power of the executive to instruct subordinates not to reveal information to unauthorized persons. So essential is this power to the functioning of the Government that until now its basic existence has never been questioned. And this Court, although dealing with related questions such as the executive's privilege to withhold information even in judicial proceedings against it, has never questioned the power of the executive to withhold military information from private persons in the ordinary course of executive business. See, *e.g., United States* v. *Reynolds*, 345 U.S. 1; *Totten* v. *United States*, 92 U.S. 105.

If the executive may decide to whom it will disclose its military secrets in the course of its operations—we are concerned now only with the existence of the general power, not with possible constitutional or statutory limitations upon it—it necessarily follows that it may exact from the recipient of the information a promise not to disclose it to other persons except as authorized. The Industrial Security Program rests squarely upon that foundation. The "power" involved—if it is useful to give it such a name—is simply the right to require recipients of military secrets to keep them secret. In short, if the executive may have military secrets at all, it may have an industrial security program.

In turn, if the executive may say to whom secret military information may be revealed in these circum-

stances, it necessarily has power—again, we are not here concerned with the limitations upon the power—to establish procedures to enable it to decide who may see the information. It could conceivably do this by undisclosed determinations by security officers informally communicated to contractors, or by the withholding of classified contracts from contractors with doubted employees. Contractors anxious for government contracts would no doubt comply whether or not they were contractually obligated to do so, and the employee's discharge would normally follow without explanation or an opportunity to refute the charges. How extensive such informal practices were before the formalization of the Industrial Security Program one can only surmise, but the formal Industrial Security Program must be viewed as resting on the same kind of power and as being, in essence, an attempt to provide greater procedural protections to doubted employees by telling them the nature of the information against them and giving them an opportunity to rebut it. The regulations establishing the Industrial Security Program are, in short, instructions to subordinates on how to exercise the indisputable and inherent power of the executive to withhold military secrets from private persons and do not depend for their validity on any legislative grant of power.

2. If, contrary to our view, it be thought that there must be some statutory grant of power for the executive branch to have and keep military secrets, it can be inferred, as a necessarily implicit authority, from the generalized provisions of the legislation providing for the organization of the defense establishment and

giving to the Secretaries the power to administer their respective departments and to control departmental property and procurement. National Security Act of 1947, 61 Stat. 495, as amended, 5 U.S.C. 171, *et seq.* Such a construction of the Act creating the Defense Department would seem in reality, however, to be but another recognition of the necessarily inherent character of that power.[7]

[7] Arguably such a grant of power may also be inferred, if necessary, from the provisions of the Armed Services Procurement Act of 1947 authorizing contracts to be negotiated without advertising when the agency head determines that the contract "should not be publicly disclosed" and providing that such contracts "may be of any type which in the opinion of the agency head will promote the best interests of the Government." 41 U.S.C. (1952 ed.) 151(c)(12), 153(a), later recodified with minor changes as 10 U.S.C. (Supp. V) 2304(a)(12), 2306(a). At the very least, this reflects a recognition by Congress of the existence of military secrets, making it necessary to exempt contracts involving such secrets from the requirement otherwise imposed that contracts be publicly advertised. The statutes making disclosures of certain kinds of classified information a crime (none of them applicable here) also constitute a recognition of the existence of secret information, affording it in the particular instances the additional protection of criminal penalties. *E.g.*, 18 U.S.C. 798 (information concerning cryptographic or intelligence activities); 50 U.S.C. 783(b) (disclosure to a member of a "Communist organization" of any information "classified * * * as affecting the security of the United States" by the agency head). The so-called "housekeeping" statute authorizing department heads to prescribe regulations governing "the custody, use, and preservation of the records, papers, and property appertaining to it," although it has in the past been construed as an affirmative grant of a power to keep military secrets beyond that inherently possessed by the executive, has recently been amended to make clear that it grants no such authority. 5 U.S.C. 22, as amended by 72 Stat. 547.

3. Whether the power of the executive to control access to secret military information in its custody be deemed a necessary part of the "executive Power" conferred upon the President by the Constitution, or a necessary inference from the statutes establishing the Defense Department and authorizing military procurement, it is clear in any event that Congress has not undertaken to regulate the power or to prescribe how it should be exercised. Thus no claim is made, or could be made, that the action taken in this case violated any statutory restrictions.[8] Similarly, no claim is made that there was a failure to comply with the regulations establishing the formal program or that the regulations were not authorized by the President.[9] Accordingly, since we do not believe that

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[8] It is noteworthy that Congress has continued to appropriate funds to finance the Industrial Security Program as part of the operating expenses of the service departments. See, *e.g.*, *Hearings before the Subcommittee on Department of Defense Appropriations for 1956 of the House Committee on Appropriations*, 84th Cong., 1st sess., 774–81 (1955). Such appropriations constitute legislative ratification of the program. *Fleming* v. *Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 116; *Brooks* v. *Dewar*, 313 U.S. 354, 361; cf. *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309, 319.

[9] Presidential regulations for the protection of security information were prescribed by Executive Order 10290, 16 Fed. Reg. 9795 (Sept. 24, 1951), and Executive Order 10501, 18 Fed. Reg. 7049 (Nov. 5, 1953). Paragraph 30(b) of the former provided that:

"Classified security information shall not be disseminated outside the Executive Branch by any person or agency having access thereto or knowledge thereof except under conditions and through channels authorized by the head of the disseminating agency, even though such person or agency may have been solely or partly responsible for its production." (fn. continued)

the general power of the executive to establish procedures to control the dissemination of classified military information in the course of executive operations can be doubted, the substantial question posed by this case is whether the particular procedures followed violated petitioner's constitutional rights. It is to that question that we now turn.

II. THE INTEREST OF A PRIVATE PERSON IN HAVING ACCESS TO CLASSIFIED DEFENSE INFORMATION IN ORDER TO BE ABLE TO WORK ON CLASSIFIED GOVERNMENT CONTRACTS IS NOT "LIBERTY" OR "PROPERTY" ENTITLED TO PROCEDURAL DUE PROCESS PROTECTIONS

A consideration of the nature of petitioner's interests and of the extent to which they are entitled to the procedural protections of the due process clause is not simply an exercise in formalism. The allocation of functions, and therefore of responsibilities, among the legislative, executive, and judicial branches is no less important to our democratic traditions than the resolution of conflicts between the state and the individual. Thus, the issue in this case is not alone, as petitioner would have it, whether the limitations on the procedural safeguards provided by the industrial security regulations are necessary or unnecessary. These are questions debated within the executive department itself and on which reasonable persons can, and do, differ. There is, however, the preliminary, and equally

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A similar provision is contained in paragraph 7(b) of Executive Order 10501. Thus, petitioner can derive no support from the presidential regulations which, like the applicable statutes, leave to the heads of the departments the development of operational procedures.

significant, question whether the issue is one appropriate for judicial resolution.

We do not think the issue can be fruitfully discussed in terms of petitioner's "standing," for the action taken in his case clearly affects sufficient interests to enable him to assert whatever rights he may have. The question is essentially one going to the merits and turns on whether petitioner has any "rights" which traditionally have been, or ought to be, accorded judicial protection. In its primary form the issue is whether petitioner's interest in access to classified defense information amounts to "liberty" or "property" of which he cannot be deprived without due process of law. It is not enough that petitioner has been seriously hurt by the action taken, for it is not true, as asserted, that procedural due process is required whenever substantial interests are affected by governmental action. Every day there are substantial interests affected in one way or another by legislative or administrative action which cannot call upon the procedural protections of the Fifth or Fourteenth Amendments.[10] For constitutional protection to be afforded, some "liberty" or "property" must first be deprived. These are, of course, not terms of immutable content; but they are limitations on the scope of the due process clause and require distinctions, not only on the basis of the sub-

[10] For example, denial of contracts or selection of contractors; the determination with whom the Government will deal; fixing the terms and conditions upon which the Government will contract; the determination of federal grants and aids; refusal to hire; refusal to make loans; changes in federal borrowing policies and procedures; changes in interest rates or central-bank practices; a decision by the Department of Justice to prosecute or not to prosecute, to bring a civil suit or not, to appeal an adverse judgment or not; etc.

stantiality and directness of the impact of government activities, but also on the basis of the "nature" of the interests affected. They afford the dividing line between those interests which are judicially protected against governmental interference and those for protection of which reliance must be placed upon the other branches of government. "Courts are not," as Mr. Justice Stone said, "the only agency of government that must be assumed to have capacity to govern." *United States* v. *Butler*, 297 U.S. 1, 87.

A. ACCESS TO CLASSIFIED DEFENSE INFORMATION IS A PERMISSIVE USE OF PROPERTY AFFORDED BY THE GOVERNMENT SOLELY FOR ITS OWN CONVENIENCE AND NO ANALOGOUS INTEREST HAS BEEN RECOGNIZED AS LEGALLY PROTECTED

1. We do not deny that the withdrawal of petitioner's security clearance operated, as a practical matter, to cause him to lose his position with ERCO, since his lack of access to classified information terminated his usefulness to the company. It may also be true, as petitioner alleges, that he has been seriously hampered by that action in obtaining other work for which his talents are particularly suited. The fact remains, however, that the subject matter of the Government's action, and the only power asserted by it, was the refusal to disclose to him, a private person, secret military information in its custody[11] and for the protection of which it was responsible. Such information is made available to private persons solely

[11] That the information was in the physical possession of the contractor obviously makes no difference. By conditioning release of the information to the contractor upon the contractor's agreement to comply with the procedures prescribed for safeguarding the information, the Government in effect retained full control over its use and dissemination.

for the convenience of the Government—when necessary to have supplies made or services performed—and not to confer benefits or advantages upon the recipient. If the recipient has any interest at all in access to the information, it can be described only as a "permissive use" for the primary convenience and benefit of the Government. When, therefore, the Government determines that it is no longer to its interest that a private person have access to such information, it is exercising its proprietary power over property committed to its custody, to terminate an arrangement, at sufferance, entered into for its own convenience and benefit.

The interest of petitioner affected by such action is not one that has traditionally been accorded legal protection. Petitioner's attempt to analogize the action to an interference with contractual relations is unsupportable, for there can be no doubt that a private person would be legally free to take precisely the same action for the protection of his trade secrets. The effort here is not to subject the Government to duties comparable to those of a private person but to subject it to greater duties because it is the Government, and it is in that light that the question must be viewed. In reality, the issue is whether petitioner's interest is one entitled to constitutional protections notwithstanding that it is not otherwise accorded recognition in our law.

2. The action of the Government in this case—the withholding from petitioner of its own military secrets—is very different in nature from the exercise of a legislative power to affect the legal rights and duties of private persons at large. In licensing cases, for

example, the administrative denial of a license derives its force from a statute making it illegal to engage in the activity without one. Thus the effect of the administrative action is to impose a legal disability upon the person denied the license. The imposition of such a disability is true of all the cases involving private employment relied upon by petitioner: *Parker* v. *Lester,* 227 F. 2d 708 (C.A. 9), seamen and longshoremen were permanently barred from their occupation and employment by private shipowners unless cleared by the Coast Guard, whether or not government contracts or shipments were involved; *Schware* v. *Board of Bar Examiners,* 353 U.S. 232, where admission to the bar was a prerequisite to the private practice of law; *Cummings* v. *Missouri,* 4 Wall. 277, and *Ex parte Garland,* 4 Wall. 333, where adherents to the Confederacy were barred from religious teaching and the practice of law; and *Truax* v. *Raich,* 239 U.S. 33, where employment of aliens in excess of a prescribed member in one of the "common occupations of the community" was forbidden.[12] It was also true of the passport cases, where departure from the country without a passport was made illegal. *Kent* v. *Dulles,* 357 U.S. 116.

It may be that the withholding of military secrets from petitioner might have the same practical consequences as would a legal bar to his employment in the aircraft industry. But to say that for that reason the two actions must be subject to the same restrictions is to ignore the whole history of the

[12] See also *Morgan* v. *United States,* 304 U.S. 1, involving government rate regulation of marketing agencies, and *Yick Wo* v. *Hopkins,* 118 U.S. 356, involving a state licensing practice found to be racially discriminatory.

development of legal rights and constitutional protections, in which the nature of the interest, and not simply the substantiality of the injury, has been of controlling importance. The difference in the nature of the powers asserted is crucial: in the one case, the Government is asserting a legislative power to regulate, by creating legally-enforceable rights and duties, an industry or a class of persons at large and to control their dealings with one another; in the other case, it is exercising a power, no different in nature from that of any private person in respect to his own property, to control the use of its own property.

That distinction is deeply rooted in our law. It has, for example, been frequently asserted as the basis for denying the standing of government contractors to object to administrative action by which they are deprived of the award of contracts. In the leading case, *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, bidders sought to enjoin the inclusion in proposed contracts of provisions requiring them to pay the prevailing wage in the "locality" as determined by the Secretary of Labor, alleging that the Secretary's determination was in violation of the statute, would prevent them from competing with bidders in other areas, and would thus cause them irreparable injury. The Court, in an opinion by Mr. Justice Black, held that the bidders had no standing to challenge the legality of the Secretary's action:

> We are of opinion that no legal rights of respondents were shown to have been invaded or threatened * * *. It is by now clear that neither damage nor loss of income in conse-

quence of the action of Government, which is not an invasion of recognized legal rights, is in itself a source of legal rights in the absence of constitutional legislation recognizing it as such. * * * [p. 125]

* * * * *

Like private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases. * * * Judicial restraint of those who administer the Government's purchasing would constitute a break with settled judicial practice and a departure into fields hitherto wisely and happily apportioned by the genius of our polity to the administration of another branch of Government. [pp. 127–28]

* * * * *

The Act does not represent an exercise by Congress of regulatory power over private business or employment. In this legislation Congress did no more than instruct its agents who were selected and granted final authority to fix the terms and conditions under which the Government will permit goods to be sold to it. * * * [pp. 128–29]

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The contested action of the restrained officials did not invade private rights in a manner amounting to a tortious violation. On the contrary, respondents in effect seek through judicial action to interfere with the manner in which the Government may dispatch its own internal affairs. And in attempted support of

> the injunction granted they cite many cases involving contested Government regulation of the conduct of private business. Their cited cases, however, all relate to problems different from those inherent in the imposition of judicial restraint upon agents engaged in the purchase of the Government's own supplies. [pp. 129–30]

The effect of the Secretary's wage determination in that case upon a contractor dependent entirely upon government contracts would obviously be the same as a legal duty to pay the prescribed wage imposed by "an exercise by Congress of regulatory power over private business," and it requires no citation of authority to show that in the latter event the contractor *would* have been entitled to challenge an allegedly illegal determination by the Secretary.

Not only does the *Lukens Steel* case demonstrate the essential difference between action by the Government in its proprietary capacity and its action in a regulatory capacity, but it also shows that those dealing with the Government in its former capacity ordinarily do not acquire any interest entitled to judicial protection. In turn, if the interest one has in obtaining government contracts—or, as in this case, in working on them—is not sufficiently significant for protection against action in violation of express statutory commands (as was alleged in *Lukens*), it is difficult to see how it can amount to "liberty" or "property" which, under the Fifth Amendment, can be taken from him only by a trial-type hearing. See also Brief for the Panama Canal Company,

Panama Canal Co. v. *Grace Line, Inc.*, Oct. Term 1957, Nos. 251–252, at pp. 46–49, 101–04.

3. It is true that the fact that an interest is not accorded judicial protection for other purposes does not necessarily mean that governmental action affecting it is entirely immune from constitutional restraints. Thus, for example, although no one has a "right" to government employment in any meaningful sense, this Court has observed that "None would deny" that "Congress may not 'enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office.'" *United Public Workers* v. *Mitchell*, 330 U.S. 75, 100. Similarly, in *Wieman* v. *Updegraff*, 344 U.S. 183, 192, the Court held unconstitutional a denial of state employment on grounds of innocent membership in allegedly subversive organizations, stating: "We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory." See also, *Slochower* v. *Board of Education*, 350 U.S. 551, holding that automatic dismissal from state employment on the sole ground that the employee invoked the Fifth Amendment privilege against self-incrimination before a federal legislative committee violated due process.

From these cases, it follows that, although no one has a legal right to access to military secrets, the Government could not establish a policy of denying access to classified defense information solely on the basis of color or some other ground bearing no rational rela-

tionship to a legitimate governmental object." To assert, however, that it also follows that a trial-type hearing must be afforded in applying a proper substantive standard is to ignore an important and fundamental difference between "substantive" and "procedural" due process. We suggest that the true explanation of the *Public Workers—Wieman—Slochower* line of cases is an evolving doctrine that the Constitution itself creates an affirmative right, regardless of the nature of the interests affected or of the protection otherwise afforded them, not to be discriminated against by state or federal government on the basis of an invidious classification.

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[13] There is no merit to petitioner's apparent suggestion that there was no rational basis for the denial of his security clearance (Br., pp. 58–64). The facts found in the statement of reasons and findings (*supra*, pp. 9–11, 12–15) obviously bear a close relationship to the requirements of the national security in protecting classified information, and the validity of the program is clearly not to be tested, as petitioner suggests, by its proven success in preventing espionage.

Equally without merit is the contention that the criteria provided by the regulations are unconstitutionally vague (Br. 51–52; Br., American Civil Liberties Union, pp. 23–27). In substance, the regulations require a judgment to be made by appropriate executive officials whether a contractor's employee is sufficiently trustworthy to warrant granting him access to defense secrets. The granting of such access must be "clearly consistent with the interests of the national security" so that no substantial doubt exists of the employee's trustworthiness. These are obviously matters of judgment and discretion, incapable of precise and detailed definition, and the boards are thus admonished to make an over-all, common-sense, determination. In all events, the only purpose of the criteria is to guide subordinates in the exercise of the authority delegated to them; they do not prescribe standards of conduct for violation of which penalties are imposed, and thus need not meet the tests of definiteness required of criminal statutes.

The evil condemned is the discrimination itself, and it is not essential that the governmental action affect any other legally-recognized interest apart from the right to be free from discrimination. In its procedural requirements, on the other hand, the due process clause is necessarily a purely negative command; one does not have a "right" to have a fair hearing but only a right not to be deprived of certain kinds of interests *without* a fair hearing. Accordingly, an existing interest must be recognized independently of the due process clause before its procedural requirements become applicable.

Although the Court has not made this distinction explicit, it is one expressly made in the Fourteenth Amendment in the difference in wording between the equal protection clause and the due process clause: while the command of one is that no person shall be deprived of "life, liberty, or property, without due process of law," the command of the other is simply that no person shall be denied "the equal protection of the laws." The latter is absolute, while the former is in terms applicable only to a deprivation of life, liberty, or property. We suggest that, in the development of "substantive" due process, much of the concept of the equal protection clause has, in effect, been incorporated into the due process clause (cf. *Bolling* v. *Sharpe*, 347 U.S. 497) and it is primarily that concept—an invidious classification by the state in itself offends the Constitution regardless of the nature of the interests that are the subject matter of the action—that explains the Court's holdings that an arbitrary classification of persons excluded or expelled

from public employment violates due process whether or not there is a "right" to public employment.

But while this interest protected by "substantive" due process springs, in some cases at least, from the Constitution itself (*i.e.*, the interest in being free from official discrimination), the interest sought to be protected by procedural due process must spring from other sources and have an existence independent of the interest in procedural due process. While freedom from discrimination on invidious grounds (*e.g.*, color, religion, etc.) may be an end in itself, procedure is a means rather than an end. Its function is to minimize possibilities of error or unfair evaluation in dealing with some substantive interest; and a substantive interest must therefore be recognized before procedural due process can be claimed. Accordingly, whatever may be the rule in "substantive" due process cases (at least as to certain kinds of discrimination), there remains the problem, whenever a right to *procedural due process* is claimed, of defining the nature of the substantive interests sought to qualify as "life, liberty, or property."

4. None of the cases cited by petitioner, therefore, supports his claim that his interest in access to confidential defense information is one constitutionally protected against deprivation without procedures satisfying the standards of due process. The cases involving governmental regulation of private persons in their dealings with each other present, as we have seen, very different problems. The only cases involving analogous (though distinguishable) interests are those dealing with government employment, and each

of those involved only substantive, and not procedural, due process questions. And, although not constitutional cases, the same kind of question—the validity of the substantive standard upon which the administrative action was taken—was involved in *Kent* v. *Dulles,* 357 U.S. 116 (passports) and *Harmon* v. *Brucker,* 355 U.S. 579 (whether the character of discharge from the Army could be based on pre-service activity). In *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U.S. 123, the only other case on which substantial reliance is made, the official action taken would admittedly have constituted defamation at common law and thus invaded a legally-recognized right. As we show below (pp. 55–58), the alleged injury to petitioner's reputation in this case cannot afford an independent basis for invoking constitutional protection if the action taken did not otherwise violate constitutional rights.

B. CONTROL OVER MILITARY SECRETS IS AN EXECUTIVE FUNCTION WHICH HAS NEVER BEEN, AND SHOULD NOT BE, SUBJECTED TO JUDICIAL REVIEW

1. For reasons implicit in the constitutional separation of powers, the courts have traditionally refused to intervene in the conduct by the Government of its internal affairs. These are matters which have wisely been left to the discretion of the executive and to correction, if necessary, by political processes. As this Court long ago recognized, and has frequently repeated, "The interference of the courts with the performance of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief; and we are quite satisfied,

that such a power was never intended to be given to them." *Decatur* v. *Paulding*, 14 Pet. 497, 516.[14] Underlying this judicial restraint is the conviction that with responsibility must also go power and that it is not on the courts alone that citizens must rely for protection: "legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." *Missouri, K. & T. Ry. Co.* v. *May*, 194 U.S. 267, 270; *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 146.

As we have noted, one such area in which the courts have been reluctant to interfere is the award of government contracts. The executive power perhaps most closely analogous to that involved here, however, is the power of removal of government employees. In cases challenging the validity of administrative dismissals of government employees, the courts have refused to go beyond a determination that any procedural or substantive rights *granted by Congress* have been complied with.[15] That history was canvassed in detail in the opinion of the court of appeals in *Bailey* v. *Richardson*, 182 F. 2d 46 (C.A.D.C.),

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[14] See also *Perkins* v. *Lukens Steel Co.*, *supra*, at 131–32; *Adams* v. *Nagle*, 303 U.S. 532, 542; *United States ex rel. Girard Co.* v. *Helvering*, 301 U.S. 540, 543; *United States ex rel. Chicago Gt. Western R.R. Co.* v. *I.C.C.*, 294 U.S. 50, 62; *Wilbur* v. *United States*, 281 U.S. 206, 218; *Work* v. *Rives*, 267 U.S. 175, 183; *Hall* v. *Payne*, 254 U.S. 343, 347; *Litchfield* v. *The Register and Receiver*, 9 Wall. 575, 577; *Gaines* v. *Thompson*, 7 Wall. 347.

[15] Subject, of course, to the requirement that the statutory grounds for dismissal may not be patently arbitrary or discriminatory. See the discussion of the *Wieman* and *Slochower* cases, *supra*, pp. 36–39.

affirmed by an equally-divided Court, 341 U.S. 918, upholding the constitutionality of the dismissal of government employees on loyalty grounds without confrontation of witnesses, and need not be repeated here. It is sufficient to say, as the court of appeals there concluded, that "Never in our history has a Government administrative employee been entitled to a hearing of the quasi-judicial type upon his dismissal from Government service" (p. 57), and that no court has ever held such process to be required.

Of course, due process is not a static concept and pages of history, for all their significance, do not necessarily control in the face of new circumstances and new problems. But the assertion that the problems presented by modern day loyalty-security programs are essentially different in nature from the age-old problems of internal administration of the Government cannot be accepted without qualification. The extensive expansion of government activities means that larger numbers of people are affected, but it is not clear why that should affect the allocation of responsibility as between the branches of government. To the contrary, the great expansion in the responsibilities of the Government gives added significance to the need for broad discretion and flexibility in determining how these responsibilities should be carried out. Nor does it seem relevant to the scope of the constitutional protections that many persons, rather than a few, suffer the same kind of injury; the rights, like the injuries, are individual.

And while loyalty-security tests, though by no means a creation of this generation, may have as-

sumed a new importance in recent years, we doubt that there is a constitutional distinction between the injury to persons dismissed on such grounds and, for example, that suffered by one dismissed, without criminal conviction, for accepting bribes (*Eberlein* v. *United States,* 257 U.S. 82), theft (*Kent* v. *United States,* 105 C. Cls. 280), or attempted seduction by force (*Golding* v. *United States,* 78 C. Cls. 682, certiorari denied, 292 U.S. 643). Yet, in those cases the courts have refused to find interests of sufficient character to be protected by procedural due process.

2. What is true of the executive's power to dismiss government employees is true with redoubled force of the power to say which private persons may have access to secret military information, for here we are dealing with the most vital interests of the nation. In no area is the constitutional responsibility of the executive branch any greater or any clearer; if there are to remain any powers of the executive free of judicial restraint, they must surely include the ultimate control of confidential defense information.

It does not appear to be questioned in this case that the final responsibility to determine which private persons may see military secrets must lie in the executive; that the executive may ultimately act in this area on mere doubts or simply a lack of complete confidence; and that the ultimate determination and judgment of the executive are not judicially reviewable. Notwithstanding the discretionary nature of the ultimate judgment, however, petitioner contends that he is constitutionally entitled to an

opportunity, in a trial-type hearing, to put his case before the officials who are to make the judgment before they exercise their discretion. This notion of a constitutionally-required hearing for action which may, if necessary, be based on no more than doubt and which itself is not judicially reviewable is a unique one. As Judge Wyzanski has observed (*Von Knorr v. Miles,* 60 F. Supp. 962, 971 (D. Mass.)), judgment vacated on other grounds, *sub nom. Von Knorr v. Griswold,* 156 F. 2d 287 (C.A. 1):

> Notice, hearing, counsel and the like are admittedly usually appropriate criteria of due process of law. But these guarantees have significance only if in the end the government's right to act turns on an official finding that certain facts exist. Where in rare cases such as orders excluding persons from defense plants in war time, the government's right to act is absolute and not dependent upon the facts concerning, or the merits of, any particular case, the formalities of a notice, hearing and counsel are not requisite. No matter what evidence might be offered by counsel for the government or counsel for the individual, the government would remain legally free to disregard the testimony and rely upon its uncorroborated suspicions. [Citations omitted.]

Prime Minister St. Laurent, in a statement to the Parliament of Canada dealing with the problem of security among government employees, similarly emphasized the non-adjudicative character of security determinations (Dominion of Canada, *House of Commons Debates;* 1951, vol. II, 2d Sess., pp. 1504–1506;

see Ass'n of the Bar of the City of New York, *The Federal Loyalty-Security Program* 201 (1956)):

> * * * The question at issue is not guilt or innocence of some particular charge. The sole question is whether a certain person can or cannot be entrusted with secret defence material. It would give a completely false atmosphere to the matter if it were assumed that reliability can somehow be put beyond doubt by meeting formal charges—or indeed, that reliability cannot be brought into doubt except on the basis of formal charges. Assessment of character may be the only consideration in some instances. That is not a matter of charges, or of trial or of proof. It is a matter of judgment.

While the political branch of the Government has the undoubted power to afford a hearing before taking security measures, notwithstanding the nature of the issue to be determined, we question how the interest in such an "advisory" hearing can rise to constitutional dignity.

3. More importantly, imposing constitutional restrictions on the procedures chosen by the executive to control the dissemination of classified military material must inevitably involve the courts in passing judgment on the executive's appraisal of the requirements of the national security, a function which the courts are ill-equipped to perform and which would result in an undue interference with the executive's primary responsibility for the protection of information relating to the national security.

This very case provides a forceful example. If a constitutional right to a hearing be recognized, the courts must then decide how much or what kind of

a hearing is required. In this case, petitioner contends that he must be given an opportunity to cross-examine the informants who supplied the derogatory information against him. The executive department, however, has concluded that disclosure of the identity of such persons and of its investigative sources and methods would jeopardize its intelligence systems—at one extreme, by revealing the identity of undercover agents, or, at the other, by breaching the confidence without which much information obtained from what petitioner calls "casual informants" might not be available.[16] There are many reasons why even "casual" informants might not wish to be disclosed or to appear at a hearing. In some cases, it may be simply a fear of personal embarrassment or a desire not to become involved. In others, the information may necessarily implicate the informant himself (*e.g.*, an ex-Communist) or other persons, not seeking a clearance, whom he would want to protect. However worthy or unworthy their motives may be, the fact remains that the intelligence systems depend heavily on voluntary disclosures and that much information would not be forthcoming without the assurance of confidence. It is the judgment of the executive department that the national security requires that the integrity of those systems be preserved by not disclosing confidential informants. See also *infra*, pp. 62–70.

[16] The record is clear that the only information not furnished to petitioner was classified and confidential information and its sources (R. 39–40, 182, 465). This is the only type of information required by the regulations not to be disclosed (App., *infra*, pp. 22a–23a, 28a–29a).

Petitioner asserts that the executive's fears are fanciful, and that at least some of the information could be disclosed without seriously injuring the intelligence systems. Which view is right may be disputed, but the crucial question is whether that is the kind of issue that the courts are equipped to, or should, resolve. The resolution of such a question, we submit, requires extensive knowledge of a kind not normally possessed by the courts—the full extent of subversive activities, the practical importance of an assurance of confidence in obtaining information, the extent to which information so developed is not obtainable in other ways, etc.—and an ultimate judgment of a kind which peculiarly must be made by those who bear the responsibility for the wisdom of their judgments.

Moreover, if the courts should undertake, which we believe they ought not, to review that judgment and ultimately to disagree with the executive on the necessity for such nondisclosure, the restraint on the executive's discretion would even then not be at an end. The suggestion that *all* confidential information must be disclosed (including the most secret "plant" in the Communist apparatus), or else that the suspected employee be given access to military secrets, cannot, we think, be taken seriously. Thus there would remain the problem—simple enough in petitioner's characterization of two clear-cut classes of informants but in real life very difficult—of distinguishing the degrees of necessity for nondisclosure of varying kinds of information, at each step of which the executive judgment would have to be justified in court, and without

the executive's being able fully to document its belief that nondisclosure is necessary or desirable.

4. The extent to which a decision recognizing a constitutional right to confrontation in this case would directly impinge upon executive responsibilities is emphasized by the nature of the relief which is sought in this action. Petitioner seeks, in effect, an order declaring the revocation of his clearance void. But a clearance is not simply a badge of honor (as was the honorable discharge from the Army ordered to be given in *Harmon* v. *Brucker*, 355 U.S. 579); it is authority to see classified defense information. Thus the relief petitioner seeks is, in substance, a mandatory injunction requiring that the Government show him (or, in practice, allow contractors to show him) defense secrets, notwithstanding the judgment of the executive branch that such disclosure might jeopardize the national safety. Any such order would, of course, leave open to the Government the alternative of revoking the clearance again (no doubt with interim suspension powers) in proceedings meeting the requirements of this Court's decision. If those requirements include the disclosure of confidential sources of information or classified materials, then the alternative likewise would require revealing information which responsible executive officials have determined should not be revealed in the interests of national security. Thus the decree sought, if it is to have any effect at all, must amount to mandamus of the executive to disclose to petitioner one of two kinds of information the secrecy of which the execu-

tive has determined to be required by the national safety.

This case, therefore, is quite different from one where the question is not whether the Government *must* disclose classified information but whether, if it refuses to do so, it must forego certain other alternative action. In such cases, the ultimate judgment can still be left to the executive whether to disclose the information or to suffer some other consequence, such as foregoing prosecution for a crime. Cf. *Jencks* v. *United States*, 353 U.S. 657; *Roviaro* v. *United States*, 353 U.S. 53. That is also an important distinction between this case and the comparable problem as to the discharge of government employees, for in the latter case it is possible to remove the employee from access to classified information without dismissing him. Those who believe that confrontation should be constitutionally required for discharge of government employees on "loyalty" grounds, at least in nonsensitive positions, have expressly recognized this distinction:

> The problem of security is real; and the Government need not be paralyzed in handling it. The security problem, however, relates only to those sensitive areas where secrets are or may be available * * *. The department heads must have leeway in handling their personnel problems in these sensitive areas. The question is one of the fitness or qualifications of an individual for a particular position. One can be transferred from those areas even when there is no more than a suspicion as to his loyalty.

> We meet constitutional difficulties when the Government undertakes to punish by proclaiming the disloyalty of an employee and making him ineligible for any government post.

Joint Anti-Fascist Refugee Committee v. *McGrath*, 341 U.S. 123, 181 (Douglas, J., concurring). Later, in concurring in *Peters* v. *Hobby* on the ground that a discharge from government employment without confrontation was unconstitutional, Mr. Justice Douglas re-emphasized this view, noting that "if the sources of information need protection, they should be kept 'secret' but in that event the information should not be used as a basis for discharging the employee (349 U.S. 331, 352). In such a case, the most that the Government would be forced to do, if it deemed it essential not to disclose the sources of the information against the employee, would be to keep an unwanted employee on its payroll in a nonsensitive position.

In this case, involving a private employer, no such choice is available. The Government does not control the dismissal of contractor employees and could not, in this case, force the contractor to retain petitioner in a nonsensitive position at his former salary and perquisites. Therefore, it necessarily follows that recognition of a constitutional right in a private person to confrontation of witnesses before the Government may withhold military secrets from him would require the Government, under compulsion of judicial decree, to disclose information (either military secrets or in-

vestigative sources) which the national security, in its judgment, requires be kept secret.

The drastic nature of a judicial order requiring specific disclosure of such information by the executive—to our knowledge unprecedented—must be weighed in the balance in appraising petitioner's claims that the full hearing he seeks, however desirable it might be, is required as a matter of constitutional compulsion. We submit that, even granting the inherent possibilities of error, injustice, and hardship in particular situations arising from the administration of the Industrial Security Program, judicial control over such processes by the establishment of a constitutional right to a due process hearing would be fraught with more injurious consequences. The Court would in effect compel officers of the Government to act in opposition to what they believe to be required by vital national interests. The denial of access to defense secrets would be set aside not because it was not fully justified on the merits, but only because the justification had not been fully disclosed. The Government would in effect be compelled to admit employees of a contractor, whom the Government believed to be of doubtful reliability or untrustworthy, to access to the defense secrets of the United States in any case where the Government concluded that confrontation was not under the circumstances possible. Such a requirement might, we believe, create a serious threat to the national safety.

5. It is said, however, that various elements of the hearing procedure now provided might be im-

proved even if the Government could not be required publicly to reveal information disclosure of which has been determined to be detrimental to the national security.[17] It is suggested, for example, that the head of the investigating agency should be required to make an *ad hoc* determination in each case whether the information can be disclosed. That, however, ignores the purpose of the regulations to preserve the integrity of the intelligence systems, and not simply the particular items of information in the individual case. Thus, to accept this suggestion, the Court must first reject the considered judgment of the executive department, on which the regulations are based, that the preservation of confidence is essential in order to obtain vital information that would not otherwise be forthcoming. And in appraising that judgment, it must be recognized that the intelligence systems are essential to many governmental functions other than the Industrial Security Program. Shutting off such sources would also limit the effectiveness of the intelligence systems for other purposes and might mean, for example, that the Government would be less successful in uncovering, from leads often supplied by confidential informants, actual espionage or subversion. See also *infra*, pp. 62–70.

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[17] We do not number among these alternatives the suggestion that the hearing board consider only the evidence produced at the hearing and not confidential reports. In cases where the confidential information would affect the decision (the only cases where the issue is important), the result of not allowing the board to consider it is precisely the same as requiring the clearance to be granted unless the Government is willing to disclose the information.

Another suggestion is that at the least the members of the hearing board should themselves examine the informants in an executive session rather than rely on investigative reports. To the extent that this would require unwilling informants to appear, it involves much the same policy judgment, for the fear of being called before an official board to give information might frequently deter one who is himself implicated from volunteering the information in the first instance. Willingness to give information to a single investigating agent, under an assurance of absolute confidence, does not necessarily imply willingness to give such information on condition that the informant be willing to appear before a hearing board. In addition, at least in some cases, the very attendance of an informant at a hearing would create a risk of disclosure of the informant's status (*e.g.*, an undercover agent in the Communist apparatus whose unexplained trip to the place of the hearing might create suspicion).

A final suggestion, which seeks to avoid any direct conflict with the executive department's judgment of the needs of the national security, is that, if nothing else, the Government ought to make every effort to persuade its informants voluntarily to testify at a hearing, if not in public then at least in an executive session. (Exceptions would presumably be allowed in the case of an informant whose very attendance at a hearing would risk disclosure.) This suggestion, as well as the proposal of greater use of executive sessions, may be worthy of consideration as desirable administrative reforms in the hearing

procedures. Not every desirable reform, however, is a matter of constitutional compulsion. Judicial enforcement of a duty to make a "good faith" attempt to procure voluntary appearance of witnesses would obviously be difficult, and, unless all of the informants agreed to appear, the gain would not be substantial. And the courts would still be presented with the problem of passing on the validity of security reasons, other than the informant's unwillingness to appear, for not producing a witness. Above all, the problem is whether the judiciary should put itself in the position of attempting to make ultimate administrative judgments of this character.

6. The extent to which recognition of a constitutional right to a trial-type security hearing would interfere with executive functions is also emphasized by its impact on contracting practices. If, for example, the executive should, in a given case, disagree with a court's appraisal of the need for not disclosing confidential information and prefer to give the employee a clearance rather than reveal the information, could not the agency involved "clear" the employee but then not award further classified contracts to his employer? If so, it emphasizes the lack of substance to the asserted "right," for normally the same ultimate result would be accomplished—*e.g.*, if the employer, realizing the cause of his loss of business, voluntarily discharges the employee, or if the reduction in business itself leads to a reduction in force with loss of employment not by one but by many. If not, the scope of judicial review is being extended to the contracting function itself.

C. THE INTEREST IN REPUTATION INJURED BY DENIAL OF A SECURITY CLEARANCE IS NOT INDEPENDENTLY ENTITLED TO CONSTITUTIONAL PROTECTION

We have reserved for separate consideration the repeated emphasis by petitioner that denial of a security clearance not only often causes an employee to lose his job but also seriously damages his reputation. It is our view that if the interest petitioner has in being able to work on classified government contracts is not otherwise entitled to constitutional protection, it is not made so because of the consequential effect such inability may have upon his reputation and that, in any event, restoration of access to classified information is not a proper remedy for an injury to reputation as such.

The suggestion that petitioner's interest in not having his reputation injured by denial of a security clearance is independently entitled to protection rests largely, as it must, on *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, and *Harmon* v. *Brucker*, 355 U.S. 579. Those cases, however, were very different. In *Joint Anti-Fascist*, the action was, in effect, one to enjoin continuing publication of a libel—*i.e.*, a listing of the organization on the Attorney General's list of subversive organizations. The determination and listing were separate and independent acts unrelated to any action being taken against the organization itself (the list was to be used in passing upon the qualification of members of the organization for government employment). The publication of the assertion that the organization was in fact "subversive" was libelous *per se* and would clearly have been actionable if made by a private party.

In *Harmon* (not a constitutional case in any event) the action taken—the granting of a less-than-honorable discharge from the Army on the basis of pre-service activity—was a gratuitous labelling unrelated to any other action being taken. The case would have been different had Harmon sought to prevent his discharge from the service, but Harmon, far from objecting to the discharge, conceded that the Army had an absolute right to discharge him for any reason it considered to be in the national interest. His sole complaint, for which this Court gave relief, was that he had a statutory right to receive a certificate of discharge reflecting solely the character of his service.

In this case, however, the Government has taken no action beyond the minimum necessary to prevent disclosure to petitioner of secret military information: it informed petitioner that he was not entitled to see such information and instructed the contractor not to allow him to see the information in its possession. No characterization has been attributed to petitioner beyond that inherent in the action itself. If he has been prejudiced, it is only by the fact that he cannot see government secrets, just as in the case of a government employee who is denied access to secret information. The further publication of petitioner's loss of his clearance and of the reasons for that action resulted only upon petitioner's election to have a hearing. In addition, the action itself does not imply a determination of fact, as in the *Joint Anti-Fascist* case, that petitioner was disloyal or subversive. It implies at most only a *doubt* of his reliability—a doubt fully consistent with the likelihood, though not suffi-

ciently certain to justify putting important military secrets in his hands, that he is *in fact* both loyal and discreet. Cf. *Beilan* v. *Board of Education*, 357 U.S. 399, 409–411 (Frankfurter, J., concurring); *Lerner* v. *Casey*, 357 U.S. 468, 478.

Petitioner claims that the public does not make such distinctions and that the denial of a clearance operates as a "badge of infamy." Even if petitioner were correct, we submit that legitimate governmental activities cannot be restrained because of such consequential effects. If the interest in working on classified government contracts is itself the kind of interest requiring constitutional procedural protection, the practical consequences of the action taken, including the damage to reputation, may no doubt be considered in balancing the fairness of the procedures provided. But if the interest directly acted upon (the right of access to confidential defense information) is not so protected, so that the official action is lawful and privileged, it cannot be deemed unlawful because of the consequential damage to reputation.

Our point is not that an injury to reputation may not be weighed in formulating the ultimate judgment whether to recognize one's interest in working on classified government contracts as a constitutionally-protected interest in "property" or "liberty," but that it does not form an independent basis for granting the relief sought. The distinction, while important here, is clearer in the case of dismissals from government employment, where the action may be taken on other than security grounds. In the context of gov-

ernment employment, we would contend that, if employees may constitutionally be dismissed on other grounds without a hearing, they may also be dismissed on security grounds, at least from sensitive positions, without a hearing. A reflection on reputation would justify, not reinstatement in a job (which must depend upon an independent right to employment as such), but at most the recognition of a cause of action for damages.[18]

As we have emphasized, the fundamental issue in this case is that of the separation of powers: Whether the traditionally plenary power of the executive to control the dissemination of military secrets in the course of executive operations, and to determine with

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[18] We do not suggest that there has been consent to suit on any such cause of action. Cf. *Dupree* v. *United States*, 247 F. 2d 819 (C.A. 3); *Dupree* v. *United States*, 141 F. Supp. 773 (C. Cls.); 28 U.S.C. 2680(h).

whom and on what terms it will deal in its proprietary capacity, can, or should be, subjected to judicial control.

As we have framed it in this Point, the issue is whether the interest one has in being permitted by the Government to see classified military information, and thus being able to work on classified contracts, amounts to "liberty" or "property" within the meaning of the Fifth Amendment. Stating the issue in those terms, and analyzing it in terms of the nature of the interests affected and not simply in terms of the substantiality of the impact of the Government's action, is, we believe, required by the history of the due process clause. Ultimately the issue may be one of political philosophy—the extent to which a democratic society should rely upon its courts to protect it from possible excesses (or what seem to some to be excesses) of its representative government and the extent to which it must rely instead upon political processes. But we have tried to show that the position advocated by petitioner in this case—the application of procedural due process requirements to action of the Government in a proprietary capacity not affecting other recognized legal interests—requires a very significant extension of the role of the courts in supervising the activities of government. Even if it could be limited to the security program, such an extension, would, we submit, seriously impinge upon the necessary powers, and primary responsibility, of the executive to protect information vital to the national security and impose upon the courts an au-

thority and a responsibility they have never assumed.

In form, this suit is one seeking restoration of petitioner's security clearance, but in substance it seeks direct judicial review of the administrative proceedings by which his clearance was revoked. Were relief to be given, it would be only nominally in the form of a declaration of the invalidity of the revocation of petitioner's clearance; its real effect would be to "remand" the case to the executive department for further proceedings in accordance with the Court's opinion. Thus it is not enough, as petitioner suggests, for the courts to hold simply that the "sum total" of the proceedings did not satisfy due process; they must also undertake to specify the errors committed and the general procedures to be followed on "remand." In short, if the courts are to enter this field, they must assume direct supervision of the methods and procedures used by the executive in determining which private persons may have access to secret military information. For over a century and a half the executive has borne the complete responsibility for the preservation of military secrets, accountable to the electorate for both the inadequacy or the excessiveness of security measures. In meeting that responsibility, the executive has, as we have shown, made a careful judgment of the needs of the national security. If the courts are now to set that judgment aside, they must also undertake the concomitant but uncongenial task of balancing the incommensurable interests at stake (the demands of national security and the injury to individuals) and

prescribing, in specific procedural requirements, the resulting compromise.

This suit, finally, is not one in which the executive branch is seeking the affirmative aid of the courts to enforce executive policies; no judicial enforcement of the executive action is either sought or required. Rather, it is the petitioner who seeks review of, and prohibition against, the carrying out of an important executive program. Thus the question is not whether the courts should withhold judicial sanction from executive action which does not meet the standards of judicial procedure; it is whether they should affirmatively interfere with and prevent the executive action. In such a case, it is particularly appropriate, within the framework of our system of separated powers, that the courts should refrain from entering a field from which they have abstained for 170 years and which poses issues far different from those traditionally dealt with by the courts.

III. ASSUMING THAT PETITIONER'S INTEREST IN ACCESS TO CLASSIFIED DEFENSE INFORMATION WAS CONSTITUTIONALLY PROTECTED, THE PROCEDURES PROVIDED IN THIS CASE SATISFIED THE REQUIREMENTS OF DUE PROCESS

Even if the procedural requirements of the due-process clause are held applicable to determinations of who may, and who may not, have access to classified defense information, we believe that there has been no denial of petitioner's constitutional rights. In this connection, it is well to recall that due process takes account of the nature of the problem involved and of the governmental powers exercised. In the words

of Mr. Justice Frankfurter (concurring in *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U.S. 123 at 163), it is not a "mechanical instrument" or a "yardstick" but is a "delicate process of adjustment" of conflicting interests:

> The Court has responded to the infinite variety and perplexity of the tasks of government by recognizing that what is unfair in one situation may be fair in another. * * * The precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed, the protection implicit in the office of the functionary whose conduct is challenged, the balance of hurt complained of and good accomplished—these are some of the considerations that must enter into the judicial judgment.

Of course, confrontation and cross-examination are normally considered basic elements of a due process hearing. However, taking into account (1) the extent of the opportunity afforded to petitioner to refute or explain the derogatory information in his case and (2) the justification for, and lack of a reasonable alternative to, keeping the sources and details of that information confidential, we do not believe that petitioner has been denied due process of law.

1. As noted, *supra*, pp. 9–11, after petitioner's access to classified information was terminated by the Secretary of the Navy on April 17, 1953, he was furnished a detailed statement, to the extent permitted by security considerations, of the information which had resulted in this action (R. 9–11). The statement was

prepared and sent to petitioner for his use in the subsequent hearing before the Eastern Industrial Personnel Security Board for redetermination of his case. All of the information had been discussed with him at his prior hearing before the Industrial Employment Review Board. It is clear from a review of this statement that petitioner was made aware of the general nature of the derogatory information contained in the government files well in advance of the hearing date. It is also clear that many of the details of that information were revealed to petitioner, including specification of names, places, and dates. Moreover, petitioner's own testimony throughout both hearings (R. 41–52, 55–66, 81–144, 158–59, 184–227, 235–49, 257–67, 402–61) demonstrated his grasp of both the nature and the details of the security information available to the hearing board. Cf. *National Labor Relations Board v. Mackay,* 304 U.S. 333; *Moog Industries* v. *Federal Trade Comm'n.,* 238 F. 2d 43 (C.A. 8); *Bailey* v. *Richardson,* 182 F. 2d 46, 58 (C.A.D.C.), affirmed by an equally divided Court, 341 U.S. 918. He was aware of the past activities and associations with named individuals and specified organizations that constituted the basis for the revocation of his security clearance, and he was aware, or was made aware, of the character of the persons and organizations with whom he had associated—only the Government's sources of this information, or certain details which would necessarily reveal the sources or investigative techniques, were kept from him.

Petitioner made no attempt to deny the essential facts but his entire case consisted of an attempt to

give his own explanation of the significance of those facts, to present the inferences which he believed the board should properly draw from them, and to state his lack of knowledge of a connection between some of his associations and the communist movement. In presenting his case, petitioner was afforded the right to counsel and had full opportunity to call any witnesses he desired.[19]

Thus, petitioner received fair notice of the general information against him (the sources and details of which were withheld for security reasons), and an opportunity to explain or refute that information to the best of his ability. And most of the primary facts of association and activity were admitted by him. For these reasons, we believe that petitioner's presentation of his case was not unduly hampered by the use of undisclosed information; rather, he was in a good position to disprove the allegations which related to himself and he was made aware of the general nature of the information against the others with whom he was linked.

2. Admittedly, the use of confidential informants, and the nondisclosure of sources of information deprive the affected individual of as full an opportunity to answer the charges as is available in judicial proceedings. "The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense." *Roviaro* v. *United States*, 353 U.S. 53, 62. As we have indicated above, the executive depart-

[19] Compare the lack of notice or hearing involved in *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, *supra*.

ment has determined that the considerations weighing against full disclosure of identity of informants, of methods of investigation, and of sources of information are of overwhelming importance. That appraisal of the competing interests, based as it is on extensive information not available to the courts, would seem necessarily to be controlling here.

The nature of the problem, and the necessary result of petitioner's position, were well expressed in the English case of *Liversidge* v. *Anderson* [1942] A.C. 206, 253-254. The House of Lords flatly rejected petitioner's view that the interest of the individual in full disclosure is so inviolate that, in deference to it, a cabinet officer may be compelled in time of crisis to act in derogation of a vital national interest. That was a suit for damages for false imprisonment based upon the detention of the plaintiff under a World War II administrative regulation. The plaintiff's arguments against the use of confidential information would have required the Secretary to choose between release of the plaintiff and disclosure of the information. Lord Macmillan said:

> As Lord Parker said in *The Zamora*: "Those who are responsible for the national security must be the sole judges of what the national security requires. It would be obviously undesirable that such matters should be made the subject of evidence in a court of law or otherwise discussed in public." * * *
>
> As I have indicated, a court of law manifestly could not pronounce on the reasonableness of the Secretary of State's cause of belief [on which detention was based] unless it were

able to place itself in the position of the Secretary of State and were put in possession of all the knowledge both of facts and of policy which he had. But the public interest must, by the nature of things, frequently preclude the Secretary of State from disclosing to a court or to anyone else the facts and reasons which have actuated him. What is to happen then? The appellant says that the court is entitled and has a duty to examine the grounds of the Secretary of State's belief. But the court is also bound to accept a statement by the Secretary of State that he cannot consistently with the public interest divulge these grounds. Here is indeed an impasse. The appellant's solution has the merit of courage, not to say audacity. He says that where the Secretary of State, by declining to disclose his information, has failed, through no fault of his own to justify the detention, he must be held confessed of having falsely imprisoned the detained person and must be mulcted in damages. It will naturally be in the most dangerous cases, where detention is most essential to the public safety, that the information before the Secretary of State is most likely to be of a confidential character, precluding its disclosure. Yet the court is to be constrained where detention is most justifiable to find the detention unjustified. I decline to accept an interpretation of the regulation which leads to so fantastic a result.

Admittedly the prejudice resulting from non-disclosure of confidential information may be substantial, but the vital national interests involved in maintaining investigative sources and methods, as well

as security and intelligence relationships, must necessarily be given controlling weight. It is not an overstatement to say that the safety of the United States may depend upon the ability of the Government to keep itself constantly supplied with information relating to the internal security. The question here is whether the necessary means of obtaining this information would be so impaired by the disclosure of its sources and details that the information itself would no longer be forthcoming. We submit that such would be the case.

This question has been most frequently debated in the context of the Government's employee security and loyalty programs, in which reports of the Federal Bureau of Investigation have been the primary sources of confidential information. A chairman of the former Loyalty Review Board has explained the need for nondisclosure as follows (Richardson, *The Federal Employee Loyalty Program,* 51 Col. L. Rev. 546, 549–50):

> * * * the role of the FBI report must be appreciated. In the overwhelming majority of cases, the record, without the FBI report, would not contain important material information with respect to derogatory items concerning the particular employee. The long and varied experience of the FBI is to the effect that its investigative reports should include statements from confidential sources. Of necessity, these sources are of varied natures. The FBI has many agents operating secretly for the purpose of ferreting out facts to aid the President. The disclosure of their identity, of circumstances in-

dicative of identity, would not only completely destroy their usefulness but in many cases subject them to serious physical danger. Other confidential informants are members of the public who will give information to the FBI only under a strict seal of confidence, their reasons being the obvious ones of the ordinary citizen who refuses to get involved in a public controversy. A further source might be fellow employees or business associates who, unless given complete anonymity, would not under any circumstances disclose their knowledge to the FBI. Numerous comparable informants might be referred to, and in the overwhelming majority of cases, the material facts with reference to derogatory items come from such confidential sources.

As a result, the FBI rigorously observes its promises of confidence and will not disclose to anyone these evidential sources. * * * It is not an answer to suggest that the confidential reports made by the FBI should be used only as a lead to actual first-hand evidence. The very nature of such confidential information implies that, since the persons would speak to the FBI only in confidence, personal testimony could not be secured even if the Board had the power to require it.

See also Hoover, *The Confidential Nature of FBI Reports*, 8 Syracuse L. Rev. 2; Hoover, *A Comment On the Article "Loyalty Among Government Employees,"* 58 Yale L.J. 401, 409–10; *Hearings before the Subcommittee of the House Appropriations Committee on Department of Justice Appropriation Bill for 1949*, 80th Cong., 2d Sess. 245–47; *Hearings before a Subcommittee of the Senate Committee on Foreign Rela-*

tions pursuant to S. Res. 231, 81st Cong., 2d Sess., Part 1, 327–28.

Petitioner insists that a distinction must be made between undercover agents and "casual" informants and that mere embarrassment or inconvenience to the latter is not a sufficient justification for not identifying them. That, however, ignores the primary purpose of the nondisclosure. As Mr. Richardson emphasized, the importance of confidence is in *obtaining* information, not in protecting it once obtained. Whatever their motives may be, or however justifiable others may think them, the fact remains that many persons will not give such information at all (sometimes, indeed, information that proves favorable to the subject) except under an assurance of strictest confidence. If such assurance is breached by disclosure, or if no such assurance may safely be given, this whole source of information necessarily evaporates.

Other governments, no less devoted than ours to the tradition of due process, have made a similar appraisal of the overriding necessity of preserving the secrecy of investigative sources. Prime Minister St. Laurent gave the Canadian Parliament this explanation for the lack of hearings in personnel security cases (Dominion of Canada, *House of Commons Debates,* 1951, Vol. II, 2d Sess., pp. 1504–1506; see Ass'n of the Bar of the City of New York, *The Federal Loyalty-Security Program,* 201–202 (1956)):

> * * * hearings could and probably would compromise our general security precautions. Some of the people about whose access to secret material we have to be most concerned operate in the interests of an organization that is skill-

> fully and tightly bound together. * * * It is only by careful, long continued and patient work that means have been established by our police forces of getting information about the operations of this organization. * * * If hearings were held, the information as to the background or other considerations causing doubt about an individual would have to be revealed. I do not see how a "hearing" could be regarded as serving any purpose if that were not so. More than that, it would be argued that the validity of such information or the grounds for doubt could not be assessed nor could any "charges" be properly refuted unless the kind and sources of information were disclosed, the informants questioned, and so forth. If that were done in even two or three instances, they might be sufficient to nullify, in very short order, such security defences as we have been able to build up after years of painstaking effort.

See also *supra*, pp. 46, 52–54.

3. This Court has on several occasions upheld administrative action based on undisclosed information, where nondisclosure was justified by reasons no more compelling than those involved here. In *Chicago & Southern Air Lines* v. *Waterman Corp.*, 333 U.S. 103, for example, the Civil Aeronautics Board, with the approval of the President, had granted a certificate of convenience and necessity for an overseas air route to Chicago & Southern Air Lines and had denied one to Waterman Steamship Corporation. The recommended order of the Civil Aeronautics Board, which had not been made public, had been changed by the President, without revealing the nature of

the specific reasons for the change. The President thereafter approved a revised order, which was made public as the final order. The Court did not hold that such a procedure deprived Waterman of its right to engage in business abroad without due process; to the contrary, the Court held that it could not even review the final order. The Court said (333 U.S. at 111):

> * * * The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit *in camera* in order to be taken into executive confidences. * * *

In *Carlson v. Landon*, 342 U.S. 524, the Court sustained the constitutionality of a statute authorizing the Attorney General, in his discretion, to hold in custody without bail, pending a determination as to deportability, aliens who are members of the Communist Party when reasonable grounds exist to believe that their release on bail would endanger the safety and welfare of the United States. The latter finding with respect to the petitioner in that case was made on the basis of confidential information, but the refusal of bail was held not to be an abuse of power or violative of due process. The action taken against the individual—detention without bail pending a deportation hearing—was more drastic than is involved in the present case, *i.e.*, denial of a

security clearance to an employee of a government contractor after a hearing. And yet the danger to the national security being met in that case—the presence in the country of an alien active in the communist movement—would seem to be less than is involved in the present case, *i.e.*, access to defense secrets by a person determined by responsible executive officials to be of doubtful reliability.

The Court has likewise upheld the use of confidential information as not violative of a statutory right to a hearing. In *United States* v. *Nugent*, 346 U.S. 1, it was held that a claim for exemption from the Selective Service Act as a conscientious objector could be denied on the basis of undisclosed information from unrevealed sources although the statute entitled the draftee to a hearing before the Department of Justice. The Court required only that a "fair résumé" of unfavorable evidence be furnished and noted the distinction between administrative and criminal proceedings, the former of which did not necessarily include a right to confront every informant.[20]

Also, a suit against the Government may not be maintained if it would necessarily lead to the dis-

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[20] Nor is confrontation required in every aspect of a criminal proceeding. In *Williams* v. *New York*, 337 U.S. 241, the Court held that a judge may impose the death sentence upon a duly convicted offender, despite the jury's recommendation of life imprisonment, upon the basis of information as to the offender's past record given by witnesses with whom the accused has not been confronted and as to whom he has had no opportunity for cross-examination or rebuttal.

closure of a state secret. *Totten* v. *United States*, 92 U.S. 105. And in tort actions against the Government, the plaintiff is not entitled to discovery of pertinent government documents if, "from all the circumstances of the case, * * * there is reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged". *United States* v. *Reynolds*, 345 U.S. 1, 10. Non-disclosure in such a case does not result in judgment for the plaintiff (as the court of appeals had held in *Reynolds*), and the Government may continue to litigate. Nor is a quasi-judicial hearing required in deciding to grant parole or in deciding whether probation once granted should be revoked. *Escoe* v. *Zerbst*, 295 U.S. 490. And aliens, who have met every congressionally-established qualification for admission to this country, may be validly denied entry on the basis of "information of a confidential nature, the disclosure of which would be prejudicial to the public interest", and with no hearing whatsoever. The Court so held in the case of an alien wife of an American citizen, *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, as well as in the case of a former resident alien, *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206. A long-resident but deportable alien, found to have met the congressionally-established requirements for eligibility for suspension of deportation, may be refused suspension by an inquiry officer on the basis of confidential information, the disclosure of which

would be prejudicial to the public interest, safety or security. *Jay* v. *Boyd*, 351 U.S. 345.[21]

The Court of Appeals for the District of Columbia Circuit has previously twice upheld the use of confidential information as not contrary to due-process requirements. In *Dayton* v. *Dulles*, 254 F. 2d 71, reversed on other grounds, 357 U.S. 144, the court sustained the administrative denial of a passport based in part on undisclosed information and sources, finding the nondisclosure to be justified on the ground that disclosure would compromise investigative sources and methods and interfere with the Government's ability to obtain reliable information. The use of confidential information was also sustained by that court in *Bailey* v. *Richardson*, 182 F. 2d 46, affirmed by an equally-divided Court, 341 U.S. 918, in the dismissal of a federal employee on loyalty grounds. Although the court held that the Fifth Amendment had no application to government employment, it went on to state that it did not believe that due process had been violated in any event. 182 F. 2d at 58–59. The court noted that the employee had received a substantial procedure, not a summary one, since she had received written notice of the derogatory information, was asked specific questions which revealed the nature of her alleged activities and associations, was permitted

[21] "And the situation is not different because the matter of suspension of deportation is taken up in [what] the [regulations require to be a] 'fair and impartial' deportation 'hearing'. Assuming that such a 'hearing' normally precludes the use of undisclosed information, the 'hearing' here involved necessarily contemplates the use of confidential matter in some circumstances." 351 U.S. at 360.

introduce evidence and testify in her own behalf, nd was represented by counsel. Substantially the ame procedure has been afforded the petitioner in the ase at bar. In both of those cases, the District of Columbia Circuit rejected the contention that the Government's efforts to guard against subversion are subject to the procedural limitations of a criminal trial. The only case cited by petitioner which holds that dministrative action taken in the interest of national ecurity (Coast Guard licensing of seamen) may not e predicated upon undisclosed information is *Parker Lester*, 227 F. 2d 708 (C.A. 9). The crucial difference in the nature of the interest affected in that ase and that affected here—and thus in the scope f procedural protections properly to be afforded—as already been pointed out (*supra*, pp. 31–36). In ddition, there is a marked contrast between the procedures invalidated in *Parker* and those accorded the etitioner here. In *Parker*, each plaintiff was sent n identical form letter purportedly informing him f the "general basis" for the denial of clearance see 112 F. Supp. 433). At no time were the plaintiffs furnished with information substantially more pecific than that the denial of clearance was "based n the belief that you are affiliated with, or sympaetic to an organization, association, group, or combination of persons subversive or disloyal to the Government of the United States," although in at least ne instance the Communist Party was specifically amed (112 F. Supp. at 439).

In ruling that these procedures were deficient under he Fifth Amendment, the Court of Appeals for the

Ninth Circuit made clear the particular aspects of the procedures to which it took exception. The district court had entered a decree permitting the plaintiffs to demand a bill of particulars but specifying that "such bill of particulars need not set forth the source of such data, nor disclose the data with such specificity that the identity of *any* informers who have supplied such allegations or data will necessarily be disclosed to the said seaman or other persons" (227 F. 2d at 711; emphasis added). Subsequent to this decree and prior to the appeal, the Coast Guard amended its regulations to bring them into substantial conformance with the decree. The Court of Appeals ruled that under this decree and the resulting regulations the plaintiffs would not be assured of notice sufficient to meet charges against them, specifically contrasting (*id.* at 715, note 11a) the new Coast Guard regulation with the regulations considered in *National Lawyers Guild* v. *Brownell*, 225 F. 2d 552 (C.A.D.C.), certiorari denied, 351 U.S. 927—regulations providing "for notice, hearings, and a determination upon the record, *except for classified security information*" (225 F. 2d at 556; emphasis added). It is plain that the Ninth Circuit was objecting to the provisions of the Coast Guard regulation which absolutely precluded the disclosure of *all* sources of information and the identity of *all* informants, with no limitation as to the need for such nondisclosure in terms of national security. The true scope of the opinion may be gleaned from the discussion at 227 F. 2d at 722, where the court compared its decision with its prior ruling in *United*

States v. *Gray*, 207 F. 2d 237 (C.A. 9). Indeed, the court made plain the limited nature of its condemnation of the use of confidential information. Its opinion closed with these significant words (227 F. 2d at 723–24; emphasis added):

> * * * we have no occasion to hold whether in subsequent attempts to carry out the objectives of the merchant seamen screening program regulations might be adopted which *in some degree qualify the ordinary right to confrontation and cross-examination of informers.* It is sufficient to say that *as framed and operated* these regulations fall short of furnishing the minimum requirements of due process in respect to notice and opportunity to be heard.[22]

In the present case, nondisclosure of information and sources has been limited by the regulations to "classified information, [or] any information which might compromise investigative sources or methods or the identity of confidential informants * * *." (App., *infra*, p. 26a). Thus, these regulations do not fall under the decision in *Parker* v. *Lester* but present a question which was expressly left unresolved.[23]

4. The American Civil Liberties Union, *amicus curiae*, raises an additional point with respect to pro-

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[22] The Coast Guard has revised its regulations by providing for the withholding of information and sources only when required by national security. See 21 Fed. Reg. 2814; see also *Lester* v. *Parker*, 235 F. 2d 787 (C.A. 9).

[23] There is no support in the regulations or in the record for petitioner's statement (Br., p. 32) that the procedure involved here "forbids in absolute terms the disclosure of any informants."

cedural due process apart from the "confrontation" issue (Br. for *Amicus*, pp. 17–19, 22). This involves the failure of the Appeal Division of the Eastern Industrial Personnel Security Board to furnish petitioner with a statement of its findings for use on his appeal to the Industrial Personnel Security Review Board (R. 463–66). The Union contends that this failure constituted a denial of due process under the decision of this Court in *Gonzales* v. *United States*, 348 U.S. 407.[24]

The *Gonzales* case involved one aspect of the procedures for determining a draftee's claim for exemption from the Selective Service Act as a conscientious objector, another aspect of which was at issue in *United States* v. *Nugent*, 346 U.S. 1, *supra*, p. 72. The Court held that the applicable regulations required the Department of Justice to furnish the draftee with a copy of its advisory recommendation to the selective service Appeal Board as to the disposition which should be made of the claim for exemption.

It should be noted first that the *Gonzales* case was not a constitutional decision but was based on a requirement found to be implicit in the regulations. In the present case, it is not contended that the regulations were violated since they expressly authorized the withholding of findings if necessitated by security considerations. (App., *infra*, pp. 22a–23a, 28a–29a).

[24] Petitioner briefly alludes to this point (Br., pp. 30–31) as one indication that the procedure afforded him did not meet minimum standards of fairness. He does not contend that, by itself, it constituted a denial of due process.

This was the sole basis for the Board's action, as petitioner's counsel was informed (R. 464–65). In *Gonzales*, a copy of the advisory recommendation was simply not furnished, without any justification being offered either on security or other grounds. Furthermore, the Court noted that disclosure of the Justice Department's recommendations in such cases was of particular importance because the Appeal Board to which the recommendations were made was performing more than an appellate function (358 U.S. at 413):

> It should be emphasized, moreover, that in contrast to the strictly appellate functions it exercises in other cases, the Appeal Board in handling conscientious objector claims is the first selective service board to receive the Department's recommendation, and is usually the only decision-making body to pass on the entire file. An opportunity for the registrant to reply is therefore the only means of insuring that this Board will have *all* of the relevant data.* * *

It seems apparent in the present case that petitioner was not prejudiced by the lack of a statement of findings. He was made aware of the nature of the derogatory information in his case at his two prior hearings, and a detailed summary of this information was furnished him in writing prior to the hearing before the Appeal Division of the Eastern Industrial Personnel Security Board. See pp. 9–11, *supra*. The material contained in the findings made by that board was, with one exception, precisely the same as the material contained in the statement furnished to petitioner of the reasons underlying the

decision of the Secretary of the Navy to revoke his security clearance. (Compare R. 9–11 with R. 23–24.) That one exception concerned the board's estimate of petitioner's credibility as a witness; knowledge of this finding could hardly have aided petitioner's appeal before the review board since its function is entirely appellate and any issue of credibility would be exclusively for the hearing board to resolve. In prosecuting his appeal to the review board, petitioner's counsel filed a brief and supporting affidavits and made no request to that board for a statement of the findings of the Appeal Division. When, after the appeal was decided, petitioner was given by the review board a statement of the Appeal Division's findings, he made no claim that he had been handicapped in his appeal because of the lack of such findings nor did he seek reconsideration of the appeal on that ground. In these circumstances, petitioner was able to present his case on appeal, and was aware from all of the prior proceedings of the basis for the Appeal Division's decision to sustain the Secretary's revocation of his clearance.

CONCLUSION

We have shown that during the 170 years of the history of the United States the courts have never questioned the power of the Executive to withhold military information from private persons and to determine to whom the Government will disclose its military secrets in the course of its operations. The Industrial Security Program rests upon that foundation, for the Executive must necessarily have the

power to determine upon a means to enable it to decide who may have access to that information.

The interest of a private person in obtaining access to classified defense information has never been deemed "liberty" or "property" entitled to procedural due process protections. Access to classified defense information is a permissive use of property afforded by the Government solely for its own benefit and no comparable interest has been recognized as a legally protected one. The judiciary has consistently refused to interfere in the conduct by the Government of its internal affairs, leaving these matters to the discretion of the Executive and to correction, if that is necessary, by legislative or other political processes. And it is difficult to conceive of any matter more inherent in the proper functioning of the executive department of the Government than the determination of those to be allowed access to classified military information.

It is respectfully submitted that the judgment of the court below should be affirmed.

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MARCH 1959.

APPENDIX

1. The pertinent statutory provisions are as follows:

A. The Armed Services Procurement Act of 1947, 62 Stat. 21, 41 U.S.C. 151, *et seq.* (1952 ed.), later recodified with minor changes as 10 U.S.C. 2301, *et seq.* (Supp. V), provides in pertinent part as follows:

> 41 U.S.C. 151(c) All purchases and contracts for supplies and services shall be made by advertising, as provided in section 152 of this title, except that such purchases and contracts may be negotiated by the agency head without advertising if—
>
> (1) determined to be necessary in the public interest during the period of a national emergency declared by the President or by the Congress;
>
> * * * * *
>
> (12) for supplies or services as to which the agency head determines that the character, ingredients, or components thereof are such that the purchase or contract should not be publicly disclosed;
>
> * * * * *
>
> 41 U.S.C. 153 * * * Except as provided in subsection (b) of this section, contracts negotiated pursuant to section 151(c) of this title may be of any type which in the opinion of the agency head will promote the best interests of the Government. * * *

B. The National Security Act of 1947, 61 Stat. 495, as amended, 5 U.S.C. 171, *et seq.*, provides in pertinent part:

> 5 U.S.C. 171a (b):
>
> The Secretary of Defense shall be the principal assistant to the President in all matters relating to the Department of Defense. Under the direction of the President, and subject to

the provisions of sections 171–171n, 172–172j, 181–1, 181–2, 411a, 411b and 626–626d of this title and sections 401–405 of Title 50, he shall have direction, authority, and control over the Department of Defense.

5 U.S.C. 411:

There shall be at the seat of government a military department, to be known as the Department of the Navy, and a Secretary of the Navy, who shall be the head thereof.

5 U.S.C. 412:

The Secretary of the Navy shall execute such orders as he shall receive from the President relative to the procurement of naval stores and materials, and the construction, armament, equipment, and employment of vessels of war, as well as all other matters connected with the Naval Establishment.

* * * * *

2. The pertinent regulatory provisions are as follows:

A. The regulations governing the 1951 proceedings of the Industrial Employment Review Board are as follows:

1. *Charter of Army-Navy-Air Force Personnel Security Board, dated 19 June 1950*

1. There is hereby created, as a joint board of the Departments of the Army, Navy, and Air Force, the Army-Navy-Air Force Personnel Security Board, which will be responsible directly to the Secretaries of the Army, Navy, and Air Force for the performance of the duties and functions hereinafter prescribed.

2. The Board will operate under general policies established and approved by the Secretaries of the Army, Navy, and Air Force, and will supersede, upon the execution of this charter, the Army-Navy-Air Force Personnel Security Board within the Office of the Provost Marshal General of the Army.

3. Each of the Secretaries of the military departments will appoint one member, and the three members so appointed will constitute the Board. Each Secretary may also appoint alternate members to serve in the place of the member appointed by such Secretary. Initially, the members of the Board will select one of the appointed members to be Chairman of the Board, and thereafter chairmanship of the Board will rotate, on a monthly basis, among the three military services. Three members, one member or alternate member from each Department, will constitute a quorum. Each Department represented will have one vote and decision of the Board will be reached by majority vote of a quorum.

4. There are hereby delegated to the Board all powers necessary and incident to the proper performance of its duties. Subject to the approval of the three Secretaries, the Board will adopt its own methods of procedure, rules and regulations governing the conduct of the business of the Board.

5. The Board will have jurisdiction for the purpose of determining, in accordance with approved policy on the subject, whether access to military information or material will be granted, denied, suspended or revoked for security reasons to: (i) *contractors* or *prospective contractors* in connection with the bidding, negotiation, award or performance of a classified contract with a military department; (ii) employees or prospective employees (citizens or aliens) of contractors or prospective contractors in connection with classified contract work for a military department; and (iii) prospective alien employees of contractors or prospective contractors in connection with contract work for a military department for the furnishing or constructing of aircraft, aircraft parts or aeronautical accessories (10 U.S.C. 310(J)). As used herein, the term "prospective em-

ployee" means any individual, who is selected by the contractor or prospective contractor for employment on work which requires security clearance in accordance with approved policy on this subject.

6. a. The Board, pursuant to the procedures, rules and regulations established in accordance with paragraph 4 hereof, will make a determination in all cases within its jurisdiction: (i) in which an *agency* of a military department has *recommended* that *access* by an individual, prospective contractor or contractor to military information *be denied,* suspended or revoked; (ii) in which a *decision* or *action* of a *field agency* of a military department *has the effect* of *denying,* suspending or revoking access by an individual to military information; and (iii) in which action by the Board is requested by the Secretary of the Military Department concerned, *Provided* that the Board will not make a determination in a case which involves a decision or action from which an appeal has been taken to the Industrial Employment Review Board, except on the latter Board's request. Reconsideration of any determination may be had as provided in paragraph 8 hereof.

b. In all cases in which final action of the Army-Navy-Air Force Personnel Security Board unfavorable to the individual, prospective contractor or contractor may result, the Board will: (i) furnish the individual, prospective contractor or contractor involved with notice of the proposed action and a statement of the reasons therefor in as great detail as, in the opinion of the Board, security considerations permit in order to provide the individual, prospective contractor or contractor with sufficient information to enable him or it to prepare a reply; and (ii) afford the individual, prospective contractor or contractor an opportunity to submit affidavits or other written evidence in his behalf within a period of time to be speci-

fied by the Board in the notice, but in any event not less than ten (10) days from the date of the receipt of the notice by the individual, prospective contractor or contractor. The failure of an individual, prospective contractor or contractor to submit affidavits or other written evidence in his or its behalf to the Army-Navy-Air Force Personnel Security Board will not prejudice his or its right to subsequent appeal to the Industrial Employment Review Board, in the event the decision of the Personnel Security Board is unfavorable to such individual, prospective contractor or contractor.

7. The Board will decide each case upon all the evidence and information before it in accordance with the criteria established for the Industrial Employment Review Board, and will set forth its decision in writing, together with the reasons therefor. The Board will announce its decision in the names of the Secretaries of the Army, Navy and Air Force. In all cases in which action has been taken in accordance with paragraph 6b above, the individual, prospective contractor or contractor involved will be informed of the decision, and, if it is adverse to such individual, prospective contractor or contractor, with a written notice of his or its right of appeal to the Industrial Employment Review Board; if the decision is favorable in these cases, the notice will also include a specific reference to the notice of proposed action previously furnished under paragraph 6b above.

8. Decisions of the Board will be final, subject only to: (i) consideration by the Industrial Employment Review Board either on appeal to it by the individual, prospective contractor or contractor involved, or at the request of the Secretary of the Military Department concerned; (ii) re-consideration by the Army-Navy-Air Force Personnel Security Board at the request of the Industrial Employment Review Board; or (iii) re-consideration by the

Board at the request of the Secretary of the Military Department concerned, on its own motion, or, in the discretion of the Board, at the request of the affected individual, prospective contractor or contractor for good cause shown, *Provided* that the Board will not make a determination in a case which involves a decision or action from which an appeal has been taken to the Industrial Employment Review Board, except on the latter Board's request. Reconsideration may extend to any decision of the Army-Navy-Air Force Personnel Security Board or of any activity of a military department which was made before the reconstitution of that Board pursuant to this Charter.

9. All of the property and records of the Army-Navy-Air Force Personnel Security Board within the Office of the Provost Marshal General of the Army will be transferred to the Board, and all administrative services including personnel, space and budget matters will be furnished by the Secretary of the Army. The Central Index File will function under the administrative supervision of the board. Direct communication between agencies of the military departments and the Board is authorized.

10. The Chairman of the Board will furnish such reports to the Secretaries of the military departments, and to the Chairman of the Industrial Employment Review Board (in cases in which the latter Board has assumed jurisdiction) concerning the work of the Board as may be requested from time to time, and the Board will be responsible for safeguarding all classified information in its possession.

11. Except at the request of the Secretary of the military department concerned, the Board will not make a determination in the following case: (i) all cases involving access to "restricted data" as defined in the Atomic Energy Act of 1946, or to research, development and production of cryptographic equipment; (ii) all cases

originating outside the continental limits of the United States; (iii) all cases involving denial, suspension or revocation of security clearance of a prospective contractor or contractor on grounds pertaining solely to the physical elements of security; and (iv) all cases involving solely a determination of the eligibility of a prospective contractor or contractor for the award or performance of a contract pursuant to the foreign ownership provision of section 10(j), Act of July 2, 1926 (44 Stat. 787, 10 U.S.C. 310(j)).

Approved:

_____,

Secretary of the Army.

_____,

Secretary of the Navy.

_____,

Secretary of the Air Force.

Date _____.

2. *Procedures Governing the Army-Navy-Air Force Personnel Security Board, dated 19 June 1950*

Consideration of cases by the Army-Navy-Air Force Personnel Security Board, pursuant to its Charter dated 19 June 1950, will be governed by the following procedures hereby established by the Board and approved by the Secretaries of the Army, Navy and Air Force.

1. *Cases to be Considered.* The Board will make a determination in all cases within its jurisdiction which are referred to it in accordance with paragraphs 5 and 6 of its Charter and pursuant to established policy on the subject. Reconsideration of cases by the Board shall be governed by paragraph 8 of its Charter. Notice of a request by the individual, prospective contractor or contractor for consideration or reconsideration of a case shall be

in writing and shall be forwarded to the Army-Navy-Air Force Personnel Security Board, National Defense Building, Washington 25, D.C.

2. *Criteria and Standards.* Each determination of the Board will be made upon all the evidence and information before it, in accordance with the criteria established for the Industrial Employment Review Board. In making its determination, the Board will take into consideration the failure to disclose to the individual, prospective contractor or contractor, the sources of information and material contained in the investigative reports, and where applicable, the lack of complete specificity of the notice to him or it of the reasons for the proposed action. Strict rules of evidence will not be applied, but the information and evidence available will be given weight according to its probative value.

3. *Initial Action*

a. Upon receipt of the request or recommendation for action by it, the Board will review the case in the light of the criteria and standards set forth in paragraph 2 and will determine whether the reported information warrants: (i) granting the individual, prospective contractor or contractor access to military information; (ii) further investigation; or (iii) further processing with a view to possible denial of access to military information.

b. In exceptional situations where, in the opinion of the Board, the continued presence of the individual in a contractor's plant, or the continued access by the individual, prospective contractor or contractor to military information, pending final decision in the case would

jeopardize seriously the security of the plant or of military information, the Board may direct an interim revocation of consent, or an interim denial of access to military information of specified security classifications. If such action has already been effected by an agency of a military department, the Board will review such action to determine the propriety of it under the circumstances. In the event, the decision by the Board to take such interim action changes the status of the individual, prospective contractor or contractor, the Board will advise the commanding officer of the agency of the military department concerned of its interim decision in the matter, with instructions to inform the individual, prospective contractor or contractor, as appropriate, of the decision, but not of the detailed reasons therefor, except that it is for security reasons.

c. If the Board determines that access to military information should be granted to the individual, prospective contractor or contractor involved, it will proceed in accordance with paragraphs 5 and 6a below, and will inform the appropriate agencies of the military department concerned of its decision.

4. *Adjudication Procedures.*

a. If, on preliminary consideration, the Board concludes, upon the information and evidence available to it, that the granting of access to military information is not clearly warranted, the Board will request further investigation, or will prepare a notice of proposed action to deny the individual, prospective contractor or contractor access to military information of specified security classifications, which notice shall include a statement of the reasons for the proposed action in as great detail as, in the

opinion of the Board, security considerations permit in order to provide the individual, prospective contractor or contractor with sufficient data to prepare his or its reply. The notice will inform the individual, prospective contractor or contractor that he or it has the right within ten (10) calendar days from the date of his or its receipt of the notice to submit an answer in writing under oath or affirmation, together with such statements, affidavits, or other documentary evidence as he or it may desire, and that, in the event he or it fails to submit such defense, the Board will decide the matter on the basis of the information and evidence available to it, without prejudice to his or its right of subsequent appeal to the Industrial Employment Review Board. The notice also will inform the individual, prospective contractor or contractor that he or it has no right to appear before the Board in person or by counsel, and that in the event of an adverse decision by the Board, he or it will be so advised and will have the right of appeal to the Industrial Employment Review Board in accordance with the terms and conditions of its Charter.

b. The Board will transmit the notice directly to the individual, prospective contractor or contractor involved by registered mail, with a request for a return receipt signed "by addressee only." Such signed receipt will be forwarded direct to the Army-Navy-Air Force Personnel Security Board for inclusion in the complete file of the case. The Board will simultaneously furnish a copy of the notice to interested agencies of the military departments for information.

5. *Decision.*

a. If the individual, prospective contractor or contractor does not reply in writing to the notice and letter of charges within the time specified, or within such extension of time for

answering as the Board in its discretion may grant, the Board will make its determination on the complete file, according to the criteria and standards set forth above.

b. If the individual, prospective contractor or contractor does submit a reply, the Board will make its decision on the complete file, including the reply and any supporting affidavits, statements, etc., according to the criteria and standards set forth above.

c. The Board will reach its decision by majority vote. The decision of the Board, which will state its reasons therefor, will be set forth in writing.

d. When the Board sets aside a decision or action involving an individual (but not a contractor or prospective contractor), the Board may, if it finds that a loss of employment resulted from such prior decision or action, recommend to the appropriate authority that the individual be reimbursed in an amount not to exceed the difference between the amount he would have earned at the rate he was then receiving and the amount of his interim net earnings, or such lesser amount as the Board may determine.

6. *Action Subsequent to Decision.*

a. The Board will announce its decision in the names of the Secretaries of the Army, Navy, and Air Force.

b. The Board will transmit directly by mail to the individual, prospective contractor, or contractor involved, a notice of its decision in writing, and in the event the decision is adverse to him or it, the notice will also advise him or it of the right of appeal to the Industrial Employment Review Board in accordance with the terms and conditions of its Charter. If the decision is favorable, the notice will also include a specific reference to the notice of proposed action previously furnished under paragraph 6b of the Charter, or similar statement in those cases not covered by that paragraph. The

Board simultaneously will advise appropriate agencies of the military department concerned of its decision. In the event of a decision adverse to an employee or prospective employee of a contractor or prospective contractor, the employer concerned also will be advised in writing of the decision. Such notices, however, will not state any reason for the decision other than that it is for security reasons. Written receipts for each notification will be obtained at the time of delivery and forwarded immediately to the Army-Navy-Air Force Personnel Security Board.

7. *Records.* The Board will maintain a complete record of its proceedings, actions and decisions. It will, on request, furnish the Industrial Employment Review Board and the Secretaries of the military departments the record of any case, and any other information or material pertaining to a case.

8. *Requests for Additional Information.* The Board is authorized to request information, material and advice, including technical and legal advice, directly from appropriate agencies of the military departments, and from outside agencies of the Government.

9. *Amendment of Existing Directives.* Insofar as the provisions of WD Pamphlet No. 32–4, December 1946, DA Memorandum No. 380–5–10, 2 April 1948, and any other directives of the Departments of the Army, Navy and Air Force are inconsistent with the procedures prescribed herein, the same are amended accordingly.

Approved:

_____,

Secretary of the Army.

_____,

Secretary of the Navy.

_____,

Secretary of the Air Force.

Date: _____

3. *Charter of the Industrial Employment Review Board, dated 7 November 1949*

As amended

1. There is hereby created, as a joint board of the Departments of the Army, Navy, and Air Force, the Industrial Employment Review Board, which shall be responsible directly to the Secretary of the Army, the Secretary of the Navy and the Secretary of the Air Force, for the performance of the duties and functions hereinafter prescribed.

2. The Board shall operate under general policies established or approved by the Munitions Board, and shall supersede upon the execution of this charter, the Industrial Employment Review Board within the Office of the Provost Marshal General of the Army.

3. Each of the respective Secretaries and the Munitions Board shall appoint one member, and the four members so appointed shall constitute the Board. The member appointed by the Munitions Board shall be a civilian and shall act as the Chairman. Each secretary may also appoint alternate members to serve in the place of the member appointed by such Secretary. One of the members shall be a qualified lawyer with membership in a State bar or its equivalent in the Territories and the District of Columbia. Any three members shall constitute a quorum; provided however, that where decisions on substantive matters affecting the actual disposition of the appellant's case are involved, a qualified lawyer, as above defined, must constitute one of the three. The Board may oppoint regional or area boards, the membership of which shall be subject to the approval of all the Secretaries and the Munitions Board for the purpose of acting for the Board at any place other than at Washington, D.C. One of the members of the regional or area

boards shall be a qualified lawyer with membership in a State bar or its equivalent in the Territories and the District of Columbia. Any three members shall constitute a quorum; provided however, that where decisions or substantive matters affecting the actual disposition of the appellant's case are involved, a qualified lawyer, as above defined, must constitute one of the three. No person who has served with an investigative agency or any of the Departments within one year preceding his appointment shall be eligible for appointment as a member or alternate member of the Board or any regional or area Board.

4. There are hereby delegated to the Board all powers necessary and incident to the proper performance of its duties, and, subject to the approval of the respective Secretaries and the Chairman of the Munitions Board, the Board shall adopt its own methods of procedure, rules and regulations governing the conduct of the business of the Board.

5. The Board shall have jurisdiction solely for the purpose of hearing and reviewing appeals from decisions of the Personnel Security Board, the effect of which decisions is to deny (i) access to classified military information or material, or (ii) access of aliens to information or material pursuant to Section 10(j) of the Act of 2 July 1926 (10 U.S.C. 310(j)).

6. The Board, pursuant to procedures, rules and regulations established in accordance with paragraph 4, shall (i) entertain all appeals within its jurisdiction, and give to the appellant reasonable notice of the time and place of hearing; (ii) shall furnish the appellant with a specific statement of charges insofar as consideration of security permits; (iii) afford the appellant an opportunity to be heard in person or by counsel (union representative or otherwise); (iv) accept evidence or other proof offered by the appellant bearing on the issues

to be determined by the Board; (v) shall furnish the appellant, upon his request, a verbatim transcript of the Board's proceedings in his case, edited only to the extent necessary to safeguard classified information; and (vi) decide each case upon all of the evidence and information available to the Board, under such criteria as shall be established jointly by the Secretaries, and shall set forth its decision in writing, together with reasons therefor. A copy of such decision shall be furnished to the appellant by the Board.

7. All of the property and records of the Industrial Employment Review Board within the Office of the Provost Marshal General of the Army shall be transferred to the Board, and all administrative services including personnel, space and budget matters shall be furnished by the Munitions Board.

8. The Chairman shall furnish such reports to the Secretaries and to the Chairman of the Munitions Board concerning the work of the Board as may be requested from time to time, and the Board shall be responsible for the safeguarding of all classified information in its possession.

(S) GORDON GRAY,
Secretary of the Army.
(S) JOHN T. KOEHLER,
Assistant Secretary of the Navy.
(S) A. S. BARROWS,
Acting Secretary of the Air Force.

Approved:
MUNITIONS BOARD,
PATRICK W. TIMBERLAKE,
Revised: 10 November 1950.

4. *Procedures Governing Appeals to the Industrial Employment Review Board, dated 7 November 1949*

As Amended

Appeals to the Industrial Employment Review Board, pursuant to its Charter dated 7 November shall be governed by the following procedures hereby established by the Board and approved by the Secretaries of the Army, Navy and Air Force, and the Munitions Board.

1. *Decisions Subject to Appeal.* Any decision of the Army-Navy-Air Force Personnel Security Board, the effect of which is to deny (i) access to classified information or material, or (ii) access of an alien to information or material pursuant to Section 10(j) of the Act of 2 July 1926 (10 U.S.C. 310(j)), may be appealed to the Industrial Employment Review Board or to a Regional or Area Board established by it (except as the context indicates otherwise all such Boards are referred to hereinafter as "the Board"); *Provided,* that upon the application of an appellant and upon good cause shown, the Board may in its discretion reconsider a prior decision of the Board whether such prior decision was made before or after the Board's reconstitution pursuant to the Charter of 7 November 1949.

2. *Rights of Appeal.* Each individual, contractor or prospective contractor against whom a decision appealable under paragraph 1 above, has been rendered, shall have the right (i) to appeal to the Board by filing notice thereof in writing, (ii) to be given reasonable notice of the time and place of hearing, (iii) to be heard in person or in writing and to be represented by counsel, union representative or otherwise, (iv) to submit evidence or other proof including the right to produce witnesses in his behalf bearing on the issues to be determined by the Board, (v) to be notified in writing of the

Board's findings and decision, and (vi) to request reconsideration by the Board of its decision for good cause shown.

3. *Initiation of Appeals.* Within 30 calendar days after the receipt of notice of a decision, appealable under paragraph 1 above, the individual, contractor or prospective contractor concerned may appeal to the Industrial Employment Review Board by submitting a written notice of appeal stating therein whether he desires to appear before the Board in person or by his counsel or representative or to submit his appeal in writing. Notice of appeal must be addressed to the Industrial Employment Review Board, c/o The Munitions Board, National Defense Building, Washington 25, D.C.

4. *Action by Industrial Employment Review Board.*

(a) *Adequacy of the Charges.* Upon receipt of a notice of appeal pursuant to paragraph 3 above, the Industrial Employment Review Board will obtain the complete record of the case from the Army-Navy-Air Force Personnel Security Board and will ascertain whether the appellant has been informed as fully as security considerations permit of the reasons for the decision appealed from. If such Board is of the opinion that the appellant was not so informed, it will cause a full statement of the reasons for the decision, insofar as security considerations permit, to be included in the notice of hearing provided for in subparagraph (b) below.

(b) *Time and Place of Hearing or Review of Case.* Upon completion of any action required by subparagraph (a) above, the Board will set a time and place for hearing or review of the case and will notify the appellant thereof in writing not less than 30 days prior to such hearing or review.

(c) *Conduct of Hearing.* In the discretion of the Industrial Employment Review Board

and as it may direct, the hearing may be held by it or by a Regional or Area Board in Washington, D.C., or elsewhere. With the consent of the appellant, the hearing may be held by a single member or alternate member of the Board. A hearing may be attended only by the members or alternate members of the Board participating therein, officials directly connected with the adjudication of the case, witnesses for the Government or the appellant, and the appellant, his counsel, or union representative or otherwise. A witness may be present only when he is actually testifying. Strict legal rules of evidence will not be applied but reasonable bounds of relevancy, competency and materiality will be maintained. All testimony will be given under oath or affirmation. The Government and the appellant may introduce such evidence or other proof, oral or written, as the Board may consider proper. The hearing will be conducted in such manner as to protect from disclosure information affecting the national security or tending to compromise investigative sources or methods, but within the limits set forth by the foregoing, the appellant or his counsel shall have the right to cross examine government witnesses who have been called. A verbatim stenographic transcript will be made of the hearing and will be retained as a permanent part of the record of the case. Upon the request of the appellant, the Board will furnish to him a copy of the transcript of the hearing, edited only to the extent necessary to safeguard classified information.

(d) *Decision.* The Board will decide each case in executive session and, in arriving at its decision, will be governed by the criteria established by the Secretaries of the Army, Navy and Air Force. The Board will reach its decision by the majority vote of a quorum. Where four members are present, the chairman shall not vote: provided, however, that where

substantive matters affecting the actual disposition of the appellant's case are involved and the only qualified lawyer is also the chairman, the chairman shall vote, and one of the remaining three members, to be chosen by ballot, shall decline to vote. When the Board sets aside a decision involving an individual (but not a contractor or prospective contractor) the Board may, if it finds that a loss of employment resulted from such decision, recommend to the appropriate authority that the individual be reimbursed in an amount not to exceed the difference between the amount he would have earned at the rate he was then receiving and the amount of his interim net earnings. The decision of the Board, which shall state its reasons therefor, will be set forth in writing. The decision will be final subject only to reconsideration by the Board on its own motion, or at the request of the appellant for good cause shown, or at the request of the Secretary of the Department concerned.

(e) *Notice of Decision.* The Board upon reaching its decision will transmit in writing said findings and notice of decision to the appellant and simultaneously furnish other copies to the interested offices of the Department of Defense, union, employer and legal representative.

5. *Records.* The Board shall maintain a complete record of its proceedings, actions and decisions. Upon receipt of a notice of appeal pursuant to paragraph 3 above, and at any time thereafter, the Board may require the Army-Navy-Air Force Personnel Security Board or any agency of the Departments of the Army, Navy or Air Force to furnish to the Board the record of the case and any other information or material under its jurisdiction pertaining to the case. The Board is authorized to examine all persons who are available upon whose evidence the letter of denial was

issued and may request relevant information and material from outside agencies of the Government.

6. *Amendment of Existing Directives.* Insofar as the provisions of WD Pamphlet No. 32–4, December 1946, DA Memorandum No. 380–5–10, 2 April 1948, and any other directives of the Departments of the Army, Navy and Air Force are inconsistent with the procedures prescribed herein the same are amended accordingly.

(S) J. TENNEY MASON,
Chairman of the Board.
(S) HAROLD R. STADFIELD, Lt. Col., JAGC,
Army Member.
(S) GEORGE L. SHANE, Capt., USN,
Navy Member.
(S) KENNETH MACKENZIE,
Air Force Member.

Approved:
(S) GORDON GRAY,
Secretary of the Army.
(S) JOHN T. KOEHLER,
Asst. Secretary of the Navy.
(S) A. S. BARROWS,
Acting Secretary of the Air Force.
(S) PATRICK TIMBERLAKE,
Munitions Board.

Date: 30 November 1949.
Revised: 10 November 1950.

B. The Industrial Personnel and Facility Security Clearance Program, effective May 4, 1953, provided in pertinent part as follows:

Industrial Personnel and Facility Security Clearance Program

SECTION I

GENERAL

1. *Purpose.* This directive prescribes the joint uniform standards, criteria and procedures governing the disposition of all cases in which a military department or an agency thereof has recommended that the clearance of a contractor or contractor employee be denied or revoked, and emergency cases in which a military department or agency thereof has revoked a clearance of a contractor employee.

* * * * *

3. *Policy.*

a. While the military departments will assume, unless information to the contrary is received, that all of their contractors and contractor employees are loyal to the Government of the United States and that granting a clearance would not endanger national security, the vital role of the military departments in national defense necessitates vigorous application of use of classified security information by such contractors and contractor employees. Therefore, adequate measures will be taken to provide continuing assurance that no contractor or contractor employee will be granted a clearance if available information indicates that the granting of such clearance may not be clearly consistent with the interests of national security. At the same time, every possible safeguard within the limitations of national security will be provided to assure that no contractor or contractor employee will be denied a clearance without an opportunity for a fair hearing.

b. A denial of a clearance does not necessarily carry any implications of disloyalty to the Government of the United States. If a person is disloyal, the granting of a clearance is not consistent with the interests of national security.

However, because of the mission of the military departments and the nature of classified security information, there may be a finding that the granting of a clearance to a particular contractor or contractor employee is not clearly consistent with the interests of national security for many reasons which have no relation to loyalty. The program is limited to making determinations with respect to security clearances; no determination is made as to the loyalty of the contractor or contractor employee to the Government of the United States.

c. Since a facility security clearance relates only to access to classified security information, the denial of a clearance to a contractor does not necessarily preclude his participation in unclassified work. A denial of a clearance to a contractor employee does not preclude his employment in positions which do not involve access to classified security information. It is not the intent of this directive to impede the shift of employees, as to whom there is derogatory information, from classified to unclassified work within the same plant or facility where it can be accomplished without detriment to and with the consent of the contractor employer.

4. *Release of Information.* All Government personnel, including all members of the Boards and the Divisions in the Program, will comply with applicable directives pertaining to the safeguarding of classified security information and the handling of investigative reports; and no classified security information or any information which might compromise investigative sources, investigative methods or the identity of confidential informants will be disclosed to any contractor or contractor employee, or to their counsel or representatives, or to any other person not cleared for access to such information. In addition, in a case involving a contractor employee, the contractor concerned will

be advised only of the final determination in the case to grant, deny or revoke clearance, and of any decision to revoke a clearance granted previously pending final determination in the case. The contractor will not be given a copy of the Statement of Reasons issued to the contractor employee except at the written request of the employee involved.

* * * * *

SECTION III

STANDARD AND CRITERIA

11. *Standard for Denial of Clearance.* The Standard for the denial of clearance shall be that, on all the information, the granting such clearance is not clearly consistent with the interests of national security.

12. *Criteria for Application of Standard in Cases Involving Individuals.*

a. The activities and associations listed below which may be the basis for denial of clearance are of varying degrees of seriousness. Therefore the ultimate determination of whether clearance should be granted must be an overall commonsense one, based on all available information.

(1) Commission of any act of sabotage, espionage, treason, or sedition, or attempts thereat or preparation therefor, or conspiring with, or aiding or abetting, another to commit or attempt to commit any act of sabotage, espionage, treason, or sedition.

(2) Establishing or continuing a sympathetic association with a saboteur, spy, traitor, seditionist, anarchist, or revolutionist, or with an espionage or other secret agent or representative of a foreign nation, or any representative of a foreign nation whose interests may be inimical to the interests of the United States, or with any person who advocates the use of force or violence to overthrow the government of the

United States or the alteration of the form of government of the United States by unconstitutional means.

(3) Advocacy of use of force or violence to overthrow the Government of the United States, or of the alteration of the form of government of the United States by unconstitutional means.

(4) Membership in, or affiliation or sympathetic association with, any foreign or domestic organization, association, movement group, or combination of persons which it totalitarian, Fascist, Communist, or subversive, or which has adopted, or shows, a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or which seeks to alter the form of government of the United States by unconstitutional means.

(5) Intentional, unauthorized disclosure to any person of security information, or of other information disclosure of which is prohibited by law.

(6) Performing or attempting to perform his duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States.

(7) Participation in the activities of an organization established as a front for an organization referred to in subparagraph (4) above when his personal views were sympathetic to the subversive purposes of such organization.

(8) Participation in the activities of an organization with knowledge that it had been infiltrated by members of subversive groups under circumstances indicating that the individual was a part of or sympathetic to the infiltrating element or sympathetic to its purposes.

(9) Participation in the activities of an organization referred to in subparagraph (4) above, in a capacity where he should reasonably have had knowledge of the subversive aims or purposes of the organization.

(10) Sympathetic interest in totalitarian, Fascist, Communist, or similar subversive movements.

(11) Sympathetic association with a member or members of an organization referred to in subparagraph (4) above. (Ordinarily this will not include chance or occasional meetings, nor contacts limited to normal business or official relations.)

(12) Currently maintaining a close continuing association with a person who has engaged in activities or associations of the type referred to in subparagraphs (1) through (10) above. A close continuing association may be deemed to exist if the individual lives at the same premises as, frequently visits, or frequently communicates with such person.

(13) Close continuing association of the type described in subparagraph (12) above, even though later separated by distance, if the circumstances indicate that renewal of the association is probable.

(14) Willful violation or disregard of security regulations.

(15) Any behavior, activities, or associations which tend to show that the individual is not reliable or trustworthy.

(16) Any deliberate misrepresentations, falsifications, or omission of material facts from a Personal Security Questionnaire, Personal History Statement, or similar document.

(17) Any criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, habitual use of intoxicants to excess, drug addiction, or sexual perversion.

(18) Acts of a reckless, irresponsible or wanton nature which indicate such poor judgment and instability as to suggest that the individual might disclose security information to unauthorized persons or otherwise assist such persons, whether deliberately or inadvertently,

in activities inimical to the security of the United States.

(19) An adjudication of insanity, or treatment for serious mental or neurological disorder without satisfactory evidence of cure.

(20) Any facts which furnish reason to believe that the individual may be subjected to coercion, influence, or pressure which may cause him to act contrary to the best interests of the national security.

(21) The presence of a spouse, parent, brother, sister, or offspring in a nation whose interests may be inimical to the interests of the United States, or in satellites or occupied areas of such a nation, under circumstances permitting coercion or pressure to be brought on the individual through such relatives.

b. Legitimate labor activities shall not be considered in determining whether clearance should be granted.

C. The pertinent portions of the Department of Defense Directive 5220.6, dated February 2, 1955, are as follows:

* * * * *

4. *Release of Information.* All personnel in the Program will comply with applicable directives pertaining to the safeguarding of classified information and the handling of investigative reports. No classified information, nor any information which might compromise investigative sources or methods or the identity of confidential informants, will be disclosed to any contractor or contractor employee, or to his lawyer or representatives, or to any other person not authorized to have access to such information. In addition, in a case involving a contractor employee the contractor concerned will be advised only of the final determination in the case to grant, deny, or revoke clearance, and of any decision to suspend a

clearance granted previously pending final determination in the case. The contractor will not be given a copy of the Statement of Reasons issued to the contractor employee except at the written request of the contractor employee concerned.

* * * * *

22. *Action by the Review Board.*

a. The Review Board will review each case submitted to it on the written record and will make its determination in each case by majority vote in accordance with the standard and criteria set forth in Section III. It may adopt, modify or reverse the findings or the determination of the Hearing Board. In the event the Review Board modifies the findings or reverses the determination of the Hearing Board, the Review Board determination shall be accompanied by a discussion of the evidence and the reasons relied upon for its action. If the decision is not unanimous, a minority opinion shall be filed.

b. After the Review Board has reached its determination, the Director will notify the person concerned, the activity initially referring the case, and other interested agencies of the final determination in the case. The Director will also issue instructions for the granting, continuing, denying or revoking of clearance in accordance with the determination.

c. Determinations of the Review Board shall be final, subject only to:

(1) Reconsideration on its own motion or at the request of the person concerned, addressed through the Director, on the ground of newly discovered evidence or for other good cause shown;

(2) Reconsideration by the Review Board at the request of the Secretary of Defense or the Secretary of any military department; or

(3) Reversal by the Secretary of Defense, or reversal by joint agreement of the Secretaries

of the three military departments at the request of one of such Secretaries.

* * * * *

24. *Reconsideration of Prior Decisions.*

a. Decisions of the Industrial Employment Review Board and of the Appeal Divisions of the Eastern, Central and Western Industrial Personnel Security Boards which denied or revoked a clearance may be reconsidered by the Review Board at the request of the person concerned, addressed through the Director, on the grounds of newly discovered evidence or for other good cause shown.

b. Decisions of the Army-Navy-Air Force Personnel Security Board and of the Screening Divisions of the Eastern, Central and Western Industrial Personnel Security Boards which denied or revoked a clearance may be reconsidered by the Screening Board at the request of the person concerned, addressed through the Director, for good cause shown.

c. In cases where a clearance has been previously granted and an activity of a military department receives additional derogatory information which was not considered by a Board at the time it decided the case and the commander of the activity is of the opinion, after reviewing the complete file including the record of any prior proceedings, that revocation of the prior clearance is warranted, he will forward the case to the Director, through appropriate channels, for referral to the Screening Board in accordance with paragraph 17.

* * * * *

D. The Industrial Security Manual for Safeguarding Classified Matter, January 18, 1951, provided in pertinent part as follows:

* * * * *

4. *General Requirements.*

a. The term "Security" as used herein refers to the safeguarding of information classified

by the Government as "Top Secret," "Secret," "Confidential," or "Restricted," against unlawful dissemination, duplication or observation because of its importance to National Defense. The Contractor shall be responsible for safeguarding all classified matter under its control and shall not supply or disclose classified matter to any unauthorized person. The safeguarding of classified information shall be provided for by suitable defensive measures within the Contractor's plant dictated by the accessibility of classified information. Whenever it is impractical to prevent unauthorized individuals from having access to classified matter by other means, it will be necessary to protect such matter by control of the area in which it is located. The detailed requirements of this manual will therefore establish the safeguards against the unlawful dissemination of classified information which can be achieved by control of matter, individuals and areas, in addition to other security measures necessary for the protection of classified matter.

* * * * *

e. The Contractor shall exclude (this does not imply the dismissal or separation of any employee) from any part of its plants, factories, or sites at which work for any military department is being performed, any person or persons whom the Secretary of the military department concerned or his duly authorized representative, in the interest of security, may designate in writing.

* * * * *

6. *Detailed Requirements for Access by Individuals.* No individual shall be permitted to have access to classified matter unless cleared by the Government or the Contractor, as the case may be, as specified in the following subparagraphs and then he will be given access to such matter only to the extent of his clearance. An individual requiring clearance shall

be selected by the Contractor's determination of the individual's need for such information in the performance of his assigned duties. Any Contractor employee who has been denied a clearance by the Government or whose clearance has been revoked by the Government shall have the right of appeal to the Industrial Employment Review Board of the Munitions Board.

a. Precontract negotiations. In the case of precontract negotiations and advertisements, only those officers, directors, owners, and key employees of the Contractor who have been cleared by the Government unless notified by the Government that such clearances are not required.

b. After award of contract. In the event a contract is awarded, only to individuals as specified in the following:

(1) United States citizen and alien employees of the Contractor who require access to matter classified Top Secret or Secret in connection with the performance of work on the contract, and who have been cleared by the Government.

(2) Alien employees of the Contractor who require access to matter classified Confidential or Restricted in connection with the performance of work on the contract, and who have been cleared by the Government.

(3) United States citizen employees of the Contractor who require access to matter classified Confidential or Restricted in connection with the performance of work on the contract, and who have been cleared by the Contractor. A clearance by the Contractor shall be based on a determination that the individual's employment records are in order as to United States citizenship and absence of derogatory information indicating that the interests of such individual are inimical to the security interests of the United States. Whenever there is any evidence that the continued employment of such

persons constitutes a security risk, a report shall be submitted to the contracting officer or his duly authorized representative.

(4) Other persons specifically authorized in writing by the Government.

c. Application for clearance. Applications for clearance shall be made by the Contractor for its officers, directors, owners, employees, consultants and other individuals not in his regular employment, for whom Government clearance is required as specified in b (1) and (2) above and shall be made to the contracting officer or his duly authorized representative by submission of the following:

(1) DD Form 48 (Personnel Security Questionnaire to be furnished by the Government) completed and executed by United States citizens.

(2) DD Form 49 (Alien Questionnaire to be furnished by the Government) completed and executed by aliens.

(3) One properly completed and executed fingerprint card (to be furnished by the Government).

(4) Whenever a clearance has been granted on persons specified in c above, by one of the military departments and the Contractor is invited to bid or is awarded a contract by any other military department, which requires clearance by the Government, the Contractor shall submit a written statement to such other department in lieu of the forms specified in (1), (2) and (3) above, stating the names of the cleared persons involved in the new bid or contract, the department which granted the clearances, the dates the clearances were granted, and the extent of the clearances. Whenever additional forms specified in (1), (2) and (3) above are required, the Contractor shall be informed.

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